[redacted]

(24,338)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 594.

GEORGE D. COLLINS, APPELLANT,

vs.

JAMES A. JOHNSTON, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1914.

a In the District Court of the United States in and for the Northern District of California, First Division.

No. 15655.

GEORGE D. COLLINS, Plaintiff,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, County of Marin, Northern District of California, Defendant.

1 UNITED STATES OF AMERICA:

District Court of the United States, Northern District of California.

Clerk's Office.

No. 15655.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, Appellee.

Præcipe.

To the Clerk of said court.

SIR: Please issue certified transcript of following record to the Supreme Court of the United States, upon the appeal in the above entitled cause, viz:

1. The Complaint and Application for the Writ of Habeas Corpus on file in said cause.
2. The Judgment entered in said cause.
3. The Appeal and Allowance of Appeal from said Judgment to the Supreme Court of the United States.
4. The Original Assignment of Errors as filed in said
2 cause, to be transmitted with the transcript of the record.
5. The Original Citation on the said appeal, to be transmitted with the transcript of the record.
6. Clerk's Certificate to the record on appeal, to be attached to same.

GEORGE D. COLLINS, *Pro Se.*

Receipt and Service of copy of within præcipe on this 12th day of June, A. D. 1914, is hereby admitted.

JAMES A. JOHNSTON,
Appellee, Warden, etc.

(Endorsed:) Filed June 24, 1914. W. B. Maling, Clerk.

In the District Court of the United States in and for the Northern District of California.

GEORGE D. COLLINS, Plaintiff,

vs.

JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, County of Marin, Northern District of California, Defendant.

Complaint in Suit for Habeas Corpus.

Revised Statutes of the United States, Section 754; 108 U. S., 556.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California and to the Court:

Comes now George D. Collins, the plaintiff in the above entitled cause, and complains to your Honorable Court that he is imprisoned, detained, and restrained of his liberty, in violation of the
4 Constitution, laws and treaty of the United States, by the said defendant James A. Johnston, the Warden of the State Prison of the State of California, at San Quentin, in the County of Marin, Northern District of California. That said unlawful imprisonment of plaintiff, the said George D. Collins, is in said State Prison at San Quentin, in said County of Marin, Northern District of California, under and by pretended authority of what purports to be, but is not, a judgment of the Superior Court, in and for the City and County of San Francisco, State of California, of which said alleged judgment, the following is a true copy, viz:

"Commitment.

"In the Superior Court, City and County of San Francisco, State of California, Department No. 11.

SATURDAY, March 10th, 1906.

Present: Hon. Albert G. Burnett, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

GEORGE D. COLLINS.

Convicted of Felony, to Wit: Perjury.

The District Attorney with the defendant and his counsel, Messrs. H. C. McPike and Louis Boardman, came into Court. The defendant was duly informed by the Court of the indictment duly presented and filed on the 29th day of December, 1905, by the Grand Jury of the City and County of San Francisco, charging said defendant

with the crime of felony, to-wit: Perjury, of his arraignment
5 on the 20th day of January, 1906, and plea of not guilty as charged in said indictment, on the 27th day of January, 1906, of his final trial and the verdict of the jury, on the 27th day of February, 1906—We, the Jury, find George D. Collins, the defendant in the above entitled case, guilty as charged in the indictment herein. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant moved the Court for a new trial, which motion was by the Court denied, to which ruling defendant excepts. The defendant thereupon moved the Court in arrest of judgment, which motion was by the Court denied, to which ruling defendant excepts. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that whereas, the said George D. Collins, having been duly convicted by this Court of the crime of felony, to-wit: perjury. It is therefore ordered, adjudged and decreed that the said George D. Collins be punished by imprisonment in the State Prison of the State of California, at San Quentin, California, for the term of fourteen years. The defendant was then remanded to the custody of the sheriff of said City and County, to be by him delivered into the custody of the proper officers of said State Prison at San Quentin, California."

That thereafter, to wit: on the 16th day of June, A. D. 1909, and under, pursuant to and solely by reason of the pretended and ostensible authority of said alleged judgment, this plaintiff, the said George D. Collins, was delivered by the said sheriff to the said State
Ptison and to the warden thereof. That ever since said 16th
6 day of June, A. D. 1909, this plaintiff has been continuously and is now imprisoned in said State Prison, solely and exclusively pursuant to, by reason of and under the pretended and ostensible authority of said alleged judgment, and not under nor by authority of any other judgment or warrant or process whatever, and has actually served in said State Prison in execution of said alleged judgment, more than one half of the sentence specified therein, computed according to the provisions of section 1588 of the Penal Code of said State.

II.

That said alleged judgment is void, and said imprisonment is unlawful, to wit: in violation of the Constitution, laws and treaty of the United States, in this:

I. That said alleged judgment and said imprisonment are in violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, in the following particulars, viz: That in the trial of said criminal action specified in said judgment, the said State of California, in violation of the Fourteenth Amendment of the Constitution of the United States, arbitrarily denied this plaintiff his constitutional right to interpose and by competent proofs maintain a certain valid and legally sufficient defense to the charge of perjury mentioned in and the basis of said judgment. That in law the said excluded defense conclusively establishes the

innocence of the accused as to the said crime charged against him. That the charge of perjury mentioned in and the basis of said judgment is that this plaintiff falsely testified as a witness in the trial of the Federal extradition case hereinafter specially averred and referred to, that a certain marriage ceremony of May 15th, A. D. 1889, did not occur between him and the prosecutrix, but that it did occur between him and another person, to wit: Agnes
7 M. Newman, and merely as a formal solemnization of a preceding and perfectly valid common law marriage. That the indictment on said charge was filed on December 29th, A. D. 1905. That on his arraignment, this plaintiff pleaded not guilty to said charge of perjury. That thereafter, and on the trial of said criminal action mentioned in said judgment, and in respect to said charge of perjury the basis of said judgment, this plaintiff presented and offered the legal defense to said charge, that testimony pertaining to a nullity, or to that which is expressly made void by statute, cannot in law constitute perjury if false, nor furnish the valid or competent foundation of a charge of perjury; and in support of said proffered defense, he tendered in the trial of said criminal action specified in said judgment, the following facts and the requisite proofs establishing them, to wit: That on the 5th day of November, A. D. 1888, at the City and County of San Francisco, State of California, this plaintiff and said Agnes M. Newman intermarried by written and mutual contract of marriage per verba de præsenti, followed by consummation and a public and mutual assumption of marital rights, duties and obligations (Civil Code of California, section 55; Const. Cal., Art. 20, sec. 7; People vs. Lehmann, 104 Cal. 634). Further, that said marriage continued to exist until dissolved by her death in May, 1901. Also that at all said times, to wit: from the said 5th day of November, A. D. 1888, until her death, the said Agnes M. Newman and this plaintiff were openly, publicly and commonly reputed and generally known in the community where they lived and had their home, and before the world, to be husband and wife, and at all said times deported themselves publicly and openly as husband and wife. That therefore and because of said previous and pre-existing marriage, any marriage ceremony between this plaintiff and the prosecu-
8 trix on the 15th day of May, A. D. 1889, to wit: the ceremony set up by the prosecution as the basis of the charge, would be void by section sixty one of the Civil Code of said State of California, and being thus made void by statute, no perjury would in law be possible in false testimony that the prosecutrix was not a party to the void marriage ceremony, when such testimony was given in a case where the cause of action and the issue before the Court for decision depended in their essential element and basis, entirely upon a valid and not a void marriage.

This plaintiff avers that the only issue on the point in the case where said testimony assigned as perjury, was given, to wit: the said Federal extradition case, was whether this plaintiff in his sworn pleading, to wit: his verified answer to the complaint in a certain civil suit brought against him as defendant in said Superior Court, by said prosecutrix as plaintiff therein, for support and main-

tenance under section one hundred and thirty seven of the Civil Code of said State, committed perjury in tendering issue in the said civil suit upon the averment in the complaint, of valid marriage to the said prosecutrix, by means of said ceremony of May 15th, A. D. 1889, by denying in his said verified answer to the complaint, the said therein alleged marriage with the prosecutrix, to wit: the plaintiff in said civil suit. That the said Federal extradition case consists entirely and exclusively of a charge of perjury in making the said denial of marriage in said verified answer to said complaint, for the purpose of trial of that specific issue in said civil suit. That said civil suit was never brought to trial or judgment, but was abandoned and discontinued by the prosecutrix after issue joined, and because said suit was entirely with-
9 out merit and unsustainable in law or fact. That the indictment in said Federal extradition case, was filed on the 13th day of July, A. D. 1905. That in the trial of said Federal extradition case, this plaintiff contended and proved that said marriage ceremony of May 15th, A. D. 1889, even if it were with the said prosecutrix as claimed by the prosecution, and made the basis of the charge, was absolutely void as a marriage, by reason of said previous and perfectly valid marriage between this plaintiff and Agnes M. Newman, and by section sixty one of the Civil Code of said State of California. That the Court on the trial of said Federal extradition case, instructed the jury that such is the law of said State.

That further in support of said proffered defense in said criminal action specified in said judgment, this plaintiff on the trial of said action, and *that* the time of presenting said proffered defense, cited to the trial judge, 2 Wharton Crim. Law, 10th Ed., section 1282; and in that behalf, further insisted that no principle of criminal law is more self-evident and axiomatic, than the one that perjury and forgery (both founded in falsity) cannot be legally predicated on an absolute nullity, or on what the statute expressly declares void ab initio, therefore non-existent in contemplation of law, and to be regarded by the courts as if it never occurred; that false testimony to a nullity is no perjury, and also cited People vs. Burnett, 8 Cal. 288. That on objection by the prosecution that they conceded the point thus raised to be the law of said State of California, but that the said proffered defense should be rejected and excluded because they were not then contending, nor did the indictment of December 29th, A. D. 1905, allege that said marriage ceremony of May 15th, 1889, constituted a legal marriage with the prosecutrix, the
10 trial judge sustained the objection, over the exception of this plaintiff that said objection of the prosecution deprived him of a perfectly valid and legally sufficient defense to the accusation, and further that it therefore deprived him of the due process of law, and the equal protection of the laws of said State of California, secured to him by the Fourteenth Amendment of the Constitution of the United States. That thereupon said trial court ruled against said exception of this plaintiff, and arbitrarily ruled out, excluded and rejected said proffered defense, and the proofs sustaining the same; and thereby did arbitrarily deny this plaintiff his constitu-

tional right to due process of law, and therein arbitrarily deny his constitutional right to present, interpose and by competent proofs maintain, a perfectly valid and legally sufficient defense to the said charge of perjury specified in and the basis of said alleged judgment: all of which is contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States, and a deprivation of the legal and constitutional right of this plaintiff to establish by means of said proffered defense, that he was and is legally innocent of said charge of perjury specified in and the basis of said alleged judgment. That had this plaintiff been permitted by said State of California to make and establish said proffered and legal defense to said accusation, he would have been legally entitled to an acquittal, and would accordingly have been acquitted and not convicted on said charge. That said proffered and rejected defense was properly admissible under the said plea of not guilty. Penal code of California, Section 1020. That it is and always has been the law of said State of California that the said proffered defense is and always was a perfectly valid and legally sufficient defense to said charge of perjury specified in and the basis of said al-
11 leged judgment. That said testimony assigned as perjury did not and could not prop up, nor impair, nor discredit any testimony given in the trial of said Federal extradition case, in things relevant or material, nor was it otherwise claimed or asserted by the prosecution nor by said State, nor by the Courts of said State, either at nisi prius or on appeal. That upon a record properly presenting the question, the appellate courts of said State altogether ignored and persistently evaded on the appeal from said alleged judgment, the point urged by this plaintiff at the trial and on the appeal, that in the denial and rejection of said proffered defense, he was deprived of his right to due process of law, and to the equal protection of the laws of said State of California, in palpable and manifest violation of the Fourteenth Amendment of the Constitution of the United States. That said State courts, to wit: the District Court of Appeal, First Appellate District, and the Supreme Court of said State of California, made no attempt on the appeal from said judgment, to pass on or decide, and did not pass on or decide said Federal question, nor in any manner advert to it, nor pass on or decide or advert to the said point in respect to the rejection of said proffered defense; but arbitrarily affirmed the said judgment to the exclusion of said point; and entirely ignored, disregarded and sedulously evaded the said point, notwithstanding that the same was very clearly and distinctly presented by the record on said appeal, and insistently pressed on the attention of said appellate courts by this plaintiff in his brief filed and submitted to the Court on said appeal, and upon his said exception to the said ruling excluding said proffered defense, as established in the Bill of Exceptions before said appellate courts, in the record on said appeal. That said point was by this plaintiff both raised and urged before said
12 appellate courts on said appeal from said judgment and in support of his prayer for a reversal of said judgment; but said appellate courts altogether ignored, evaded and did not pass

upon or decide the point, and for the reason that it would have necessitated in law, a reversal of said judgment.

That by reason of said *abr*itrary exclusion and rejection of said proffered and legally sufficient defense to said charge of perjury specified in and the basis of said judgment, this plaintiff is now deprived of his liberty by said State of California, without due process of law, and denied by said State the equal protection of the laws thereof, all of which is in violation of the Fourteenth Amendment of the Constitution of the United States. That in respect to the facts upon which said proffered and rejected defense *if* predicated, this plaintiff avers that on the 5th day of November, A. D. 1888, he and the said Agnes M. Newman intermarried in the said City and County of San Francisco, and thence unto the time of her death in May, 1901, were continuously husband and wife, publicly, generally and commonly reputed to be such, and deporting themselves as such in the community where they lived and had their home, and also elsewhere before the world. That this plaintiff so testified to said marriage and its continuance until dissolved by death, and gave such testimony as a witness on the trial of said Federal extradition case, in connection with and as qualifying said testimony, the basis of said charge of perjury mentioned in said alleged judgment. That no charge of perjury has ever been made and no perjury has ever been assigned on said testimony relative to said previous marriage of November 5th, A. D. 1888. That said State concedes the truth of said testimony as to said prior
13 marriage (2 Wharton Crim. Law, 10th Ed. section 1300).

This plaintiff further avers that he is imprisoned and made to suffer involuntary servitude in said State Prison, in violation of the Thirteenth Amendment of the Constitution of the United States, and as hereinafter particularly alleged. That inasmuch as the said imprisonment is unlawful for the reasons hereinbefore set forth, the same is manifestly also in violation of the specific treaty right of this plaintiff specially averred in paragraph VIII of this complaint.

2. That said alleged judgment and the said imprisonment, and the said conviction are also unlawful, to-wit: in violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, in the following particulars, viz:

That said alleged judgment is not and never was a judgment of the Superior Court in and for the City and County of San Francisco, nor the judgment of any legally constituted court of judicature of the State of California. That the said "court" rendering said alleged judgment was never vested by said State with any jurisdictional authority whatever, and said alleged trial and conviction, specified in said alleged judgment, and the said alleged judgment are absolute nullities, in that Judge Burnett, who presided at said trial and conviction and who rendered said judgment, was never at any time, a judge de facto, nor a judge de jure of the Superior Court in and for the City and County of San Francisco, State of California, and was never an appointed nor an elected judge thereof, but was then and there at all said times a duly elected, qualified and acting judge of the Superior Court in and for the County of

Sonoma, in said State—a Court absolutely and entirely without any jurisdiction whatever over the case, or over the person of this plaintiff, or over the indictment, or over the subject matter of the indictment specified in said alleged judgment. That Judge Burnett presided at said trial and conviction mentioned in said alleged judgment, at the request of the governor of said State, and without the consent or stipulation of this plaintiff, and without the request or consent of the Superior Court in and for said City and County of San Francisco, or of any of the judges of that Court. That at all said times, the Superior Court in and for the City and County of San Francisco, was a court of judicature of said State of California, consisting of, and its jurisdiction vested by the Constitution of said State in a judicial tribunal or court of twelve elected judges, but with a special exception specified in said constitution of said State, to the effect that such court and the jurisdiction thereof, may be held and administered by one of its said elected judges, and when so held, that the "judgments, orders and proceedings of any session of the Superior Court, held by any one or more of the judges of said court, shall be equally effected as if all the judges of said court presided at such session." (Constitution of California, Section 6 of Article 6). That no similar provision was at any time made in any law, constitution or statute of said State of California, for the exercise of said jurisdiction or the administration thereof, in a "court" held by a judge from another county in said State, nor for any session of a "court" so held, until the casus omissus existing in that respect in Section 8 of Article 6 of said constitution of said State, was supplied by the constitutional amendment adopted thereto, on the 8th day of November, A. D. 1910, wherein for the first time, it is expressly provided in said State constitution, that the judgments, orders, acts and proceedings of any session of the Superior Court when held by a judge from another county, shall be equally effective as if all of the regularly elected judges of the Court presided at such session. And provision is also specifically made therein for the sessions of the court, when held by a judge from another county. That because of said casus omissus existing in section 8 of Article 6 of said State constitution, prior to its said amendment on November 8th, 1910, the "court" held by Judge Burnett in the trial, conviction and sentence of this plaintiff as specified in said alleged judgment, was not a legally constituted court of judicature of the State of California, but was merely a private arbitration, unknown to the law, entirely ultra vires all judicial authority, and absolutely without jurisdiction of any kind or nature, over the person of this plaintiff, or over the indictment or charge mentioned in and the basis of the said alleged judgment, and had no power or authority whatever in law or in fact to pass said sentence in said alleged judgment specified, nor to render said alleged judgment.

That no judge of said Superior Court in and for said City and County of San Francisco, participated in said proceedings, trial conviction or sentence specified in said alleged judgment, nor in said alleged judgment, and the same are not the proceedings, trial, conviction or sentence or judgment of the Superior Court in

and for the City and County of San Francisco. That at all said times, there were twelve elected judges of said Superior Court in and for said City and County of San Francisco, all of whom were then and there, the duly elected, qualified and acting judges thereof,
and each of whom was then and there fully competent to try
16 said indictment and said charge of perjury specified in said
alleged judgment and not disqualified in respect thereto. That this plaintiff has never consented to any of the said proceedings held by Judge Burnett, but on the contrary has always objected thereto, and to said trial, conviction, sentence and alleged judgment, for want of jurisdiction over the person and subject matter. That to apply said constitutional amendment of November 8th, 1910, to the case of this plaintiff, as do the courts of said State, is to make the same an ex post facto law, prohibited by section 10 of article I of the Constitution of the United States. That by reason of said total absence of jurisdictional authority, in said "court" held in San Francisco, in the case of this plaintiff, by Judge Burnett, each and every the said proceedings, trial, conviction, sentence and said alleged judgment therein, are not due process of law, and are a denial by said State of California of the equal protection of the laws thereof, all of which is in violation of the Fourteenth Amendment of the Constitution of the United States. That this plaintiff could not, without a manifest violation of the said Fourteenth Amendment, be put upon his trial on a criminal charge, nor convicted or sentenced on such charge, except by a legally constituted and established court of judicature of said State of California, or of the United States, with competent jurisdiction vested by law. That such was not the "court" held by Judge Burnett in the said trial, conviction and sentence of this plaintiff, to-wit: the trial, conviction and sentence specified in said alleged judgment. That therefore the same are not the due process of law, nor the equal protection of the laws of said State, guaranteed this plaintiff by the Fourteenth Amendment of the Constitution of the United States, but are in
manifest violation of said constitutional provisions.
17 That said imprisonment being unlawful for the reasons
stated, the same is also in violation of the treaty right of this plaintiff, specially pleaded in paragraph VIII of this complaint.

3. That the said alleged judgment and the said imprisonment thereunder, are also in violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, in that said sen*t*ence in said alleged judgment specified, and the said imprisonment in execution thereof, constitute and are a cruel and unusual punishment in this: That the same are grossly and ferociously excessive, and therein without authority of law, contrary to the law of the land, and not the due process of law required by the Fourteenth Amendment. That the only punishment recognized by the Thirteenth Amendment in the exception therein provided, is one that is not cruel or unusual. That a grossly excessive and therefore illegal sentence to the State Prison, and a grossly excessive and therefore illegal imprisonment therein, are prohibited by both the Thir-

teenth and Fourteenth Amendments of the Constitution of the United States. That said sentence and imprisonment because grossly and ferociously excessive, are also prohibited by section 6 of article 1 of the Constitution of the State of California, in the provision inhibiting cruel or unusual punishment. (Weems vs. United States, 217 U. S. 349.) That said State of California and the Courts of said State, do arbitrarily and without legal cause or excuse, deny to plaintiff the benefit and protection of said provision of said State constitution against cruel or unusual punishment, and in
18 similar circumstances readily accord its benefits and protection to every person entitled to the same, other than plaintiff, thereby denying him the equal protection of the laws of said State, in violation of the Fourteenth Amendment of the Constitution of the United States.

That the charge of perjury mentioned in and constituting the basis of the said alleged judgment is, that upon the trial of the said Federal extradition case in the Superior Court in and for the City and County of San Francisco, and upon a contested issue therein, as to the existence of a certain alleged marriage set up by the prosecution as the foundation of the extradition charge, this plaintiff (it is alleged), testified falsely that a certain marriage ceremony, one void by section 61 of the Civil Code of said State of California, did not occur between himself and the prosecutrix. That said testimony did not, and could not by any possibility, induce or influence any order, judgment or decree of any court or judge, nor any verdict or judicial proceeding, and did not, and could not by any possibility injure or tend to injure any one in his or her rights or status in law. That it is and always was the law of said State of California, that injury or the possibility of injury, is the only legal and legitimate basis for the admeasurement of the penalty in perjury. (People vs. Burnett, 8 Cal. 288.) That said sentence and imprisonment are illegal and grossly excessive, unusual and cruel punishment, for the following reasons, viz.: In the first place, the alleged injury was absolutely and entirely negative and negligible in consequences, and with no possibility of injury to any one, or to the cause of public justice, or to the administration of the law by the Courts. In the second place, the maximum
19 penalty for the more serious offense of giving false evidence in court, by means of false documentary proofs, is five years imprisonment in the penitentiary and no more, according to sections 18 and 132 of the Penal Code of said State of California. So that if this plaintiff had by his oath, introduced in evidence upon the trial of said Federal extradition case, and thereby caused to be admitted in evidence, a false certificate of marriage as to the parties participant in even a valid marriage ceremony, one perfectly valid as a marriage, and not void by section 61 of the Civil Code of said State of California, he could not be sentenced to a greater penalty than five years' imprisonment in the penitentiary. In the next place, the maximum penalty prescribed by statute, for felonies generally in said State is five years' imprisonment in the penitentiary and no more. (Penal Code, section 18.) That in forty three in-

stances of felonies under the laws of said State of California, many of them offenses of greater gravity and of more injurious consequences than perjury, the average maximum penalty is five years' imprisonment in the penitentiary, and no more. That in the courts of the United States, in cases of perjury, the maximum prison penalty prescribed by statute is five years' imprisonment, and no more; especially pertinent here, because the alleged perjury mentioned in and constituting the basis of said alleged judgment is charged to have been committed in said Federal extradition case. That the usual sentence for perjury in said State of California as given by the courts thereof, and shown by prison statistics, does not exceed three years' imprisonment, even where the perjury is pro-
20 ductive of serious injury. That the established rule of the statute in said State, in fixing the penalty for perjury, at from one to fourteen years' imprisonment, is the minimum penalty for the minimum injury to-wit: one year's imprisonment in the penitentiary. That the designation in the statute, of fourteen different prison penalties in cases of perjury, is tantamount to a requirement that the punishment be graduated and proportioned to the special offense, disclosed by the facts and circumstances in each particular case, and the presence or absence of injurious consequences, and such too is the principle of constitutional law enunciated by the Supreme Court of the United States in Weems vs. United States, 217 U. S. 349. That according to the laws of said State of California, there is no other legitimate basis for fixing the penalty in perjury than that of injury caused by the testimony assigned as perjury, except in the special case provided for in section 667 of the Penal Code of the said State. That said special provision has no application to the case of this plaintiff, as he never was convicted of crime, previously to said alleged conviction mentioned in said alleged judgment. That said conviction is void, and never would have been possible, if this plaintiff had been given a square deal, a fair and impartial trial before an unprejudiced court and jury, and the equal protection of the laws of said State of California, due his legal rights. That the appellate courts of said State also denied this plaintiff these fundamental rights, in order to sustain said unlawful conviction, and avoid the legal necessity of vacating and reversing said alleged judgment.

That the maximum penalty of fourteen years' imprisonment is legally applicable only to cases of extreme and most destruc-
21 tive injury, such for instance where an innocent person is imprisoned in the penitentiary upon a sentence for life, as the result of perjury, or the safety of the State is imperiled by means of perjury, as in cases of treason, and like instances of a special enormity. That the said assailed testimony, the basis of said unlawful conviction in the case of this plaintiff, could not by any possibility be productive of any injury whatever, in the action where the same was given, to-wit: the said Federal extradition action, and for that reason also the said sentence is grossly excessive and illegal. That the said Federal extradition case was dismissed by the prosecution, on the 12th day of July, A. D. 1909, as is hereinafter specially

averred, because it could not be maintained on the law or the facts, to-wit: first, in that the court where the alleged perjury the basis of the indictment in said Federal extradition case, was charged to have been committed, to-wit: the court in which said civil suit hereinbefore alleged, was pending, had no jurisdiction thereof because of the failure of the complaint therein to aver the requisite jurisdictional facts. In the next place, the oath in dispute was the truth and not false, and this independently and irrespective of any testimony given by the accused, and especially independently and irrespective of the testimony the basis of the said charge mentioned in and the foundation of said alleged judgment; and finally, that the accused as defendant in said civil suit had the constitutional right to interpose a legal defense therein, and in that behalf to take issue upon a material averment of the complaint, and to have such issue determined on the evidence in the case; that therefore to intercept his constitutional right in that respect by a prosecution for alleged perjury in the necessary presentation of such de-
22 fense by verified denial in his answer, and do so in advance of and to the exclusion of the trial of the issue, constituted an infringement of his legal right to make defense in said civil suit, and was therefore a violation of the Fourteenth Amendment of the Constitution of the United States.

That a fair and determinative test most favorable to the State, and most conclusive as to whether the said sentence and the imprisonment already served thereunder, are grossly and atrociously excessive in the case of this plaintiff, is a penalty of five years' imprisonment; itself a grossly excessive and unusual punishment when applied to the facts and circumstances, and the entire absence of injurious consequences, and of all possibility of injury. That this plaintiff has actually served in said penitentiary more than one half of said sentence and penalty of fourteen years, to-wit: more than a sentence and penalty of seven years, under and by virtue, and in execution of said alleged judgment, and is now being restrained and detained of his liberty in said State Prison without authority in law. That there can be no valid authority for a grossly and ferociously excessive sentence; and therefore the imprisonment is illegal to the extent it is excessive, and for that reason also constitutes an unlawful interference with and obstruction to the treaty right of this plaintiff, in this complaint, specially pleaded in paragraph VIII. That the jurisdiction of the Superior Court in and for the City and County of San Francisco, in criminal cases, is exclusively derived from the Constitution of the said State of California, and said constitution places upon said jurisdiction, the prohibitive restriction in section 6 of article 1, that the sentence must not be grossly and ferociously excessive, and if it is, renders it void as being cruel and unusual punishment (Weems vs. United States, 217 U. S. 349); and the resulting imprisonment is the
23 deprivation of liberty without due process or any process of law, in contravention of the Thirteenth Amendments of the Constitution of the United States, and also in violation of said treaty right, that both the Thirteenth and Fourteenth Amendments in

legal effect make applicable to the case of this plaintiff the provisions of the Eighth Amendment of the Constitution of the United States inhibiting cruel or unusual punishment.

That in any event, the Constitution of the State of California in section 6 of article 1, prohibits a grossly excessive sentence in a criminal case as being cruel and unusual punishment. (Weems vs. United States, 217 U. S. 349). That therefore the said imprisonment is the deprivation of liberty without due process of law, and is the denial by said State of the equal protection of its laws, and is also a manifest violation of said treaty right.

That the trial judge who gave said sentence, and also the judge before whom the assailed testimony was given, and also the prosecution, to-wit: the District Attorney prosecuting the case, and also the present District Attorney of said City and County of San Francisco, have certified that said sentence and imprisonment are excessive, and recommended to the Governor of said State that this plaintiff be pardoned, pursuant to section 1596 of the Penal Code of said State. That said Governor arbitrarily and capriciously refuses to grant the pardon, stating that while this plaintiff is entitled thereto, that nevertheless he is also entitled to his release on parole, and declines to accept parole. That it is true this plaintiff refuses to accept a parole and be at large restricted to the abject status of an incompetent ward of a penitentiary, with all of the debasing and onerous disabilities thereto appertaining; for at best a penitentiary parole is only a quasi and disreputable liberty without freedom,
and an exceeding oppressive as well as degrading perpetua-
24 tion and aggravation of said grossly excessive sentence and said grossly excessive imprisonment, and made more burdensome by the impossibility of properly undertaking and responding adequately to life's responsibilities, in the denial of the requisite normal and legal freedom essential to the purpose. That a parole from a penitentiary is no remedy for a grossly excessive sentence or a grossly excessive imprisonment, and no mitigation of the same, and is no remedy for an unlawful conviction of a man innocent of crime.

That said sentence and said imprisonment are in violation of both the Thirteenth and Fourteenth Amendments of the Constitution of the United States in the particulars averred, and in violation of section 6 of article 1 of the Constitution of the State of California. That said imprisonment is consequently an unlawful obstruction to and violation of the treaty right of this plaintiff, hereinafter specially pleaded in paragraph VIII of this complaint.

4. That section 126 of the Penal Code of said State of California, as applied to the case of this plaintiff by the courts of said State, is, in its resulting operation, a violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, in that said section 126 of the said Penal Code operates to deny this plaintiff the equal protection of the laws of said State, and to deprive him of his liberty, without due process of law. That said statute arbitrarily discriminates against him in favor of those who violate section 132 of the Penal Code, and other cognate provisions of the criminal

code of said State, in the matter of the penalty inflicted upon plaintiff, and by reason whereof he is now imprisoned as herein averred. That said imprisonment being therefore unlawful,
25 it is also a violation of the treaty right of this plaintiff, hereinafter specially pleaded in paragraph VIII of this complaint.

5. That said charge of perjury mentioned in said alleged judgment is based entirely upon the testimony given in San Francisco, in the Federal extradition case hereinafter specially averred, and therefore is not within the jurisdiction of said State of California, nor of the courts of said State, but belongs entirely and exclusively to the cognizance and jurisdiction of the District Court of the United States in and for the Northern District of California. That said imprisonment is for that reason also, in violation of the Constitution and laws of the United States, and habeas corpus will issue as of right, in the first instance from said District Court of the United States, irrespective of any remedy in the State Courts.

In Re Loney, 134 U. S. 372;
Holmgren vs. United States, 217 U. S. 509.

6. That said alleged judgment and said imprisonment are in contravention and violation of the Treaty of Extradition between the United States and Great Britain, in that said alleged judgment and said imprisonment are in manifest violation of the Federal extradition jurisdiction over the person of this plaintiff, arising from and the result of his extradition by the United States from Canada, on the 16th day of October, A. D. 1905, under and by virtue of the international warrant of extradition issued by Canada on that date to the United States, by the legal authority of which the United States acquired the custody of this plaintiff from Canada, under and pursuant to the provisions of the said Treaty of
26 Extradition between the United States and Great Britain, but in trust, for the express and only purpose of bringing this plaintiff to trial and judgment upon a certain specific charge of perjury, to-wit: the said charge of perjury consisting in said verification of his answer in the civil suit, as hereinbefore specially averred, tendering issue upon an allegation of marriage in the complaint filed in said civil suit. That thereafter and on the 12th day of July, A. D. 1909, the said charge of perjury, the basis of the said extradition case, *were* upon motion of the prosecution, and of said State of California, dismissed by the court in which the same were pending, to-wit: the Superior Court in and for said City and County of San Francisco. That the said dismissal is final, and remains of record in said Superior Court, in full force and effect, and never has been vacated, set aside nor appealed. That the judgment of dismissal was duly given and made and entered in said Superior Court, on said 12th day of July, A. D. 1909. That prior to said dismissal of said extradition charge, and while said charge and said Federal extradition case were pending in said Superior Court, awaiting trial therein to a final conclusion, pursuant to the requirements of the Treaty and laws of the United States, this

plaintiff was nevertheless and by said State of California, on the 29th day of December, A. D. 1905, and a manifest violation of said Federal extradition jurisdiction over his person, taken by force and arms (vi et armis), from the said legal custody of the United States, to-wit: the custody acquired and held by the United States over the person of this plaintiff, under and by virtue of said international Warrant of Extradition, and was thereupon by said
27 State of California, forcibly seized and arrested, and thereafter tried, convicted, sentenced and imprisoned without the consent of the United States, or of this plaintiff, upon another and essentially different charge of perjury, on which there had been no extradition whatever, to-wit: the charge of perjury referred to and specified in, and constituting the basis of said alleged judgment. That in all said proceedings on the part of said State of California, in derogation and subversion of said extradition, and against said seizure, trial, conviction, sentence and imprisonment, this plaintiff at every step therein in that respect, interposed his objection and protest, and upon the specified ground that said proceedings are in violation of said treaty and laws of the United States, in that the same are acts and proceedings illegal*ly* and interfering with and constituting a manifest violation of the said Federal extradition jurisdiction held by the United States over the person of this plaintiff by virtue of said international Warrant of Extradition; and further, that said Treaty of Extradition and section 5275 of the Revised Statutes of the United States, and international law, and the Extradition Act of Canada, prohibited the said seizure, arrest, prosecution, trial, conviction, sentence and imprisonment of this plaintiff on said second charge of perjury, until after the said extradition case had first been finally disposed of in said Superior Court and the said Federal extradition jurisdiction over the person of the accused had first legally terminated, or become satisfied or extinguished; and that said Federal extradition jurisdiction over the person of the accused, was supreme and exclusive until it had wrought its function; that therefore said seizure, arrest, trial, conviction, sentence and imprisonment by said State of California, were and are a
28 violation of section 2 of article 6 of the Constitution of the United States. That each and all of said objections and protests were overruled by said State and by the courts thereof. That at all said times, to-wit: from the said extradition surrender made by Canada of this plaintiff to the United States, under said international Warrant of Extradition unto the said dismissal of the said Federal Extradition case, on the 12th day of July, A. D. 1909, this plaintiff was legally assigned by said Treaty of Extradition to the exclusive custody of the United States by the supreme authority of said international Warrant of Extradition, in trust for the purposes of said extradition, and had not been previously to said dismissal of said extradition case, delivered, nor his custody transferred or surrendered by the United States, to said State of California, nor to any officer or representative or judge or court of said State. That said extradition jurisdiction over the person of plaintiff as held by the United States pursuant to and by virtue

of said international Warrant of Extradition, did at all said times and continuously unto the time of said dismissal of said extradition case, legally persist and continue till terminated by said dismissal, and to the entire exclusion of any other jurisdiction or authority over the person of this plaintiff, by said State of California. That in obtaining said extradition, neither the State of California or the United States had any intention then or thereafter to bring this plaintiff to trial to a final conclusion upon said extradition charge, but on the contrary extradited him for the sole and only purpose of returning him to San Francisco for other and ulterior reasons, and to answer alleged civil liabilities. That therein said extra-
29 dition was and is in fraud of said Treaty and of the legal rights of this plaintiff. That the promise made by the United States to Great Britain in the matter of said extradition, to-wit: that this plaintiff would first and in regular course of law, be brought to trial to a final conclusion, upon said extradition charge, to the exclusion of any other charge, was then and there a promise made without any intention to perform it. That had it not been for said promise, the said extradition would not have been granted to the United States by Canada or Great Britain, but would have been refused.

That this plaintiff was and is innocent of said crime of perjury specified in said international Warrant of Extradition, and also of said crime of perjury upon which said conviction was obtained. That had this plaintiff been first, and in regular course of law, brought to trial to a final conclusion, upon said extradition charge, he would have been acquitted thereof, and such acquittal would have been a bar to said second charge of perjury, to-wit: the charge specified in and constituting the basis of said alleged judgment, in that the acquittal would be res adjudicata of an essential element and constituent of said second charge of perjury, concerning the void marriage ceremony (United States vs. Butler, 38 Fed. Rep. 499; Coffey vs. United States, 116 U. S. 436, 446; Cooper vs. Com., 106 Ky. 909.) That both of said charges of perjury were based upon and made in certain indictments found and filed in said Superior Court against this plaintiff. That the first of said Indictments, to-wit: the Indictment in said Federal extradition case, was found
30 by a grand jury and filed in said Superior Court, while this plaintiff was a resident and inhabitant of Canada, and not while he was a resident and inhabitant of the State of California. That prior to said indictment no charge of perjury had been made against him in said State of California, nor was he aware in departing from said State, that any such charge was contemplated or possible. That under and by virtue of the Treaty of Extradition between Great Britain and the United States, this plaintiff was extradited by the United States from Canada on the 16th day of October, A. D. 1905, for trial to a final conclusion, upon said charge of perjury set forth in said first filed indictment. That the following is a true copy of the international Warrant of Extradition hereinbefore referred to, and pursuant to which the United States acquired and in law held jurisdiction over and legal custody of the

person of this plaintiff until July 12th, A. D. 1909, upon said extradition charge, viz:

"Warrant under the Extradition Act to the Sheriff of the County of Victoria, B. C.; the Keeper of the Common Goal at the City of Victoria, B. C., and to Thomas B. Gibson re George D. Collins, Dated 16th October, 1905, Recorder 16th October, 1905.

[Official Seal.]

Joseph Pope, Dep. Registrar General of Canada.

"CANADA:

To the Sheriff of the County of Victoria and the Province of British Columbia, to the Keeper of the Common Goal at the City of Victoria, in said County, and Thomas B. Gibson:

31 "Whereas, George D. Collins, accused of the crime of perjury committed within the jurisdiction of the United States of America, was delivered into the custody of you, the said Keeper of the Common Goal at Victoria, aforesaid, by warrant of his Honor, Peter Secord Lampman, a Judge under the 'Extradition Act' dated the nineteenth day of August, in the year of our Lord, One Thousand, Nine Hundred and Five, pursuant to the said 'Extradition Act' there to await the surrender to the United States of America.

"Now, I do hereby, in pursuance of said Act, order you, the said sheriff, and you, the keeper of the common goal, to deliver the said George D. Collins into the custody of the said Thomas B. Gibson, and I command you, the said Thomas B. Gibson, to receive the said George D. Collins, into your custody, and to convey him within the jurisdiction of the said United States of America, and there place him in the custody of any person or persons appointed by said United States of America to receive him.

"For which this shall be your warrant.

"Given under the hand and seal of the undersigned Minister of Justice of Canada, this sixteenth day of October, in the year of our Lord, One Thousand, Nine Hundred and Five."

(Signd) "C. FITZPATRICK,
"[L. S.] *"Minister of Justice."*

32 That the said Thomas B. Gibson, the person designated in said warrant of extradition was then and there an officer and agent of the United States, and not an officer or agent of the State of California, and for the purpose of receiving the custody of this plaintiff in behalf of the United States, from Canada, and did accordingly receive such custody for an- in behalf of the United States, and did, as such officer and agent, convey this plaintiff within the jurisdiction of the United States, as commanded by said warrant, and said United States did thereby recieve and acquire jurisdiction over the person of this plaintiff in trust for the sole and

only purpose of bringing him to trial to a final conclusion upon said extradition charge, and upon the said indictment on which said charge was based, and for no other purpose.

That the United States never at any time appointed any person or persons to take or receive the custody of this plaintiff from the said Thomas B. Gibson, nor from the United States. That the said "Extradition Act" specified in said international Warrant of Extradition, requires that the person whose extradition is granted, be surrendered on the extradition requisition, upon condition that he be brought to trial in regular sequence, in due course of law, and to a final conclusion, upon the specific charge on which *is* extradition is obtained, and upon no other charge, until after the final termination of the extradition case by conviction, acquittal or dismissal, and not then, or at all, if the subsequent or other charge be of an offense committed prior to the extradition, unless
33 in that event he is first given a reasonable opportunity to return to Canada, and fails to do so. That the United States obtained and accepted said extradition of this plaintiff, upon said condition and upon its said promise to make compliance therewith, strictly and in good faith, and would have done so had it not been for said unlawful action and interference on the part of said State of California, in intercepting the due course of the extradition process and taking, seizing and keeping the custody of this plaintiff without consent of the United States, upon said indictment on said second charge of perjury specified in and the basis of said alleged judgment, and thereupon proceedings to said trial, conviction and judgment, while said extradition case was then and there pending and awaiting trial to a final conclusion, pursuant to the treaty and laws of the United States, and said international Warrant of Extradition.

IV.

That in the administration of section 126 of the Penal Code of said State of California, the courts thereof construe and interpret the same as requiring the minimum penalty for the minimum injury, to-wit: one year's imprisonment, and so apply the provision in all cases to which it is pertinent, except in the case of this plaintiff; and as to him have, from passion and prejudice, arbitrarily denied him the equal protection of the said judicial construction and interpretation of said section 126 of the Penal Code of said State, though granting it to every one else entitled to it, in similar circumstances. That as shown by prison statistics, the usual punishment for the crime of perjury in said State of California,
34 where there has been substantial injury caused by the offense, does nor exceed a penalty of three years' imprisonment in the penitentiary. That in discriminating arbitrarily against this plaintiff, from passion and prejudice in this matter, of said grossly and ferociously excessive penalty imposed upon him, the courts of said State of California have thereby and without cause or excuse denied him the equal protection of the laws of said State, contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

V.

That the Eighth Amendment of the Constitution of the United States, is applicable to all matters, and the judicial determination of all matters where pertinent, and within the exclusive province and sphere of the sovereignty and authority of the Federal Government: and therefore to the determination, protection and enforcement of legal rights derived from Treaties of Extradition. That a grossly and ferociously excessive sentence to imprisonment in the penitentiary for a long term of years, to the extent it thereby illegally interferes with or obstructs the treaty right of return to the country whence taken on international extradition, is a matter justiciable within the corrective and remediable cognizance and jurisdiction of the United States, to be determined therefore by the Eighth Amendment; and the fact that the illegal sentence and imprisonment,—illegal to the extent they are excessive (Weems vs. United States, 217 U. S. 349), were inflicted and imposed by the State, or
35 by a State Court, does not exclude the case from the legitimate scope of the Eighth Amendment, in the decision of the Federal question presented. That in such a case the question whether the sentence and punishment are illegal to the extent they are grossly excessive and of ferocious severity; therefore an unlawful obstruction to and infringement upon the treaty right of return. (Cosgrove vs. Winney, 174 U. S. 68, 69), is essentially and distinctively a Federal question, to be determined by the Constitution, treaty and laws of the United States, including the Eighth Amendment.

That in the matter of international extradition the authority of the United States is exclusive and supreme, and the State Courts in carrying out the purpose of the extradition are in contemplation of both international and constitutional law, the Courts and agency of the United States, to the same extent and in the same sense as in cases of naturalization of foreigners; and therefore for that reason, also the Eighth Amendment is applicable to the validity of the sentence, and punishment, in all cases of international extradition. pursuant to treaty. That the said sentence and punishment inflicted upon this plaintiff are cruel and unusual, for the reasons and upon the grounds hereinabove alleged in this complaint, and the resulting imprisonment is remediable on habeas corpus from the United States District Court, in the first instance, both for the reason it is a violation of the said treaty right of return, and also a violation of the Eighth Amendment of the Constitution of the United States.

36 VI.

That the "due process of law" secured to plaintiff by the Fourteenth Amendment of the Constitution of the United States, requires a judicial proceeding before a competent and pre-established Court of judicature of said State of California, vested with adequate jurisdiction of the case, of the person and subject-matter. That the Thirteenth and Fourteenth Amendments of the Constitution of the United States require that the punishment or imprisonment for

crime, must be based on a legal conviction wherein as essential thereto, the accused has first been afforded an opportunity to be heard before condemnation, and in that behalf to make and establish any legally sufficient defense he may have to the charge made against him, and before a competent and pre-established court of judicature of said State, vested by law with adequate jurisdiction; and further, that the punishment upon conviction must not be cruel or unusual. That a grossly and ferociously excessive sentence and imprisonment to a long term in the penitentiary, constitute "cruel and unusual punishment," within the meaning of both section 6 of article 1 of the Constitution of the State of California and of the Eighth Amendment of the Constitution of the United States (Weems vs. United States, 217 U. S. 349). That because of the absence of the said three essential pre-requisites stated, the existing imprisonment of this plaintiff in the penitentiary of said State, is involuntary servitude prohibited by the Thirteenth Amendment of the Constitution of the United States. That plaintiff does not contend the non-jurisdictional errors or defects in the proceedings, are reviewable by the Federal Courts, under said Thirtenth or Fourteenth Amendments. He insists they are not. His contention is
37 restricted to the three jurisdictional requirements above specified, to-wit: the constitutional right to a hearing before condemnation, and therein to interpose and maintain by sufficient evidence a valid and legally conclusive defense to the accusation, in proof of his innocence of the crime charged against him. The constitutional right to a trial of the charge before a pre-established and legally competent court of judicature of the State, vested by the laws thereof with requisite jurisdiction. The constitutional right in case of conviction to protection against cruel or unusual punishment, and therein against a grossly excessive sentence to or a grossly excessive imprisonment in the State Prison. That said Thirteenth and Fourteenth Amendments of the Constitution of the United States, in effect make applicable to the case of this plaintiff, the provisions of the Eighth Amendment of said Constitution, and if not, then section 6 of article 1 of the Constitution of the State of California, makes said imprisonment absolutely illegal and destitute of all valid authority. That such an imprisonment in the penitentiary, to-wit: an imprisonment prohibited by the laws of said State or of the United States, is involuntary servitude within the prohibition of the Thirteenth Amendment, and is not due process of law within the requirement of the Fourteenth Amendment. That said imprisonment being unlawful, is also a violation of the treaty right of return specially pleaded in paragraph VIII of this complaint.

VII.

That upon each of the grounds in this complaint set forth, the said trial, conviction and sentence, and the said imprison-
38 ment of this plaintiff are in violation of the provisions of section 2 of Article 4 of the Constitution of the United States, and also abridge his privileges and immunities as a citizen of the

United States. That at all said times this plaintiff was, ever since has been and now is a citizen of the United States.

That said imprisonment is also unlawful and void, and in violation of the Thirteenth and Fourteenth Amendments of the Constitution of the United States, because prohibited by section 126 of the Penal Code of said State of California, in that said statute rightly construed does not authorize a sentence to, nor imprisonment in, the penitentiary for more than one year, where no injury results or can possibly result from the alleged perjury, and no order, judgment or decree or verdict or judicial proceeding has been induced or influenced thereby, and where any such consequence is impossible in law and fact. It results that an imprisonment for more than one year in the case of this plaintiff, has no authority and can have no authority in law, and therefore is a deprivation of liberty without due or any process or warrant of law, and for that reason in violation of both the Thirteenth and Fourteenth Amendments of the Constitution of the United States, and also in violation of the Treaty right of return pleaded in paragraph VIII of this complaint.

VIII.

That the said imprisonment being unlawful, to-wit: in manifest violation of the Constitution and laws of said State of California, and of the United States, for the reasons and upon the grounds specified in this complaint, it manifestly constitutes an illegal obstruction to and is a palpable invasion of the legal right of
39 this plaintiff, derived from said Treaty of Extradition between Great Britain and the United States, to return to the country whence he was taken on said extradition, to-wit: Canada, (Cosgrove vs. Winney, 174 U. S. 68, 69), and is property remediable by Writ of Habeas Corpus from the United States District Court, Northern District of California, within the established doctrine that the Writ will issue in the first instance and of legal right, from the United States District Court, (and without requiring a previous recourse to the State courts for redress), whenever and wherever a legal right derived from treaty is set up by the prisoner in support of his claim for liberation on habeas corpus, and in defeasance of his detention in prison, and a prima facie case is presented in that behalf. The authorities on this and the other points raised herein are cited in the Brief herewith filed by this plaintiff in support of this complaint.

That the said unlawful imprisonment is the only existing obstruction to and interference with the said Treaty right of return, and illegally prevents this plaintiff from availing himself of said Treaty right, and illegally deprives him of the beneficial protection of the same against said unlawful imprisonment, and against its continuation.

IX.

That this plaintiff regularly prosecuted and had recourse to and entirely exhausted in the courts of said State of California, all the remedies provided or permitted by the laws of said State, or by said

courts thereof, as against said unlawful conviction, judgment, sentence and imprisonment, and in that behalf *restored* to
40 appeal, and also to petitions for habeas corpus in said State courts, on said grounds in this complaint set forth, but without avail. That the said State of California, and the courts of said State, to-wit: the District Court of Appeal-, First Appellate District, and the Supreme Court of said State, arbitrarily failed and refused to exercise their vested and acknowledged jurisdiction in the matter of said petitions for habeas corpus, and arbitrarily failed and refused to issue a writ of habeas corpus or a rule nisi, for the hearing and consideration of the case. That no Federal writ of error will issue against said action of said State Courts in so failing and refusing to exercise jurisdiction, as the same is not a final or any judgment in the cause, on any of the Federal questions raised, within the meaning of section seven hundred and nine of the Revised Statutes of the United States, and section two hundred and thirty seven of the Judicial Code. That the revisory jurisdiction of the Supreme Court of the United States over the State Courts is restricted to final judgments determining Federal questions, and depends on a strict compliance with the terms of the statute above cited (Capital Nat. Bank vs. Cadiz Nat. Bank, 172 U. S., 425). That no Federal writ of error will issue to the judgment of affirmance on the appeal, as the State courts utterly failed and refused to pass upon any of the Federal questions involved and raised, but on the contrary, purposely evaded, actually ignored and entirely disregarded the same, and thereupon affirmed the said alleged judgment, treating said Federal questions as if entirely absent from the case, and not before the appellate courts for decision, though raised and urged by
41 the appellant, upon a record fully justifying and sustaining them. That said Federal questions were ignored by said District Court of Appeal and by said Supreme Court of said State, simply because they would have necessitated the reversal and annulment of said alleged judgment. That there is no remedy available to plaintiff as against said unlawful imprisonment under said alleged judgment, other than the Federal Writ of Habeas Corpus from the District Court of the United States, Northern District of California.

X.

Wherefore, and by reason of the several grounds in this complaint stated, and on the Federal questions presented herein, the plaintiff prays that your Honorable Court grant him the Writ of Habeas Corpus, directed to the said defendant, James A. Johnston, the Warden of the State Prison of the State of California, at San Quentin, in the County of Marin, Northern District of California, and returnable before your Honorable Court at a time and place therein in said Writ designated.

That upon the hearing, it be by your Honorable Court adjudged that said imprisonment and also the said alleged judgment, under and by virtue of which said imprisonment is maintained, are in violation of the Constitution, laws and treaty of the United States, and

that therefore this plaintiff be ordered discharged from said imprisonment and restored to his liberty.

GEORGE D. COLLINS,
Plaintiff, Pro Se.

42 UNITED STATES OF AMERICA,
Northern District of California, ss:

George D. Collins, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information or belief; that as to those matters he believes it to be true.

GEORGE D. COLLINS.

Subscribed and sworn to before me this 19th day of May, A. D. 1914.

[SEAL.] HORACE M. JANES,
Notary Public in and for the County of Marin, State of California.

My commission expires Feb. 7th, 1918.

(Endorsed:) Filed, May 19, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

43 In the United States District Court in and for the Northern District of California, First Division.

No. 15655.

GEORGE D. COLLINS
vs.
JAMES A. JOHNSTON, Warden, etc.

On Habeas Corpus.

Judgment of Dismissal.

The complaint or petition herein having been duly submitted in open Court and having been fully considered and the Court having ordered that said complaint be dismissed and the petition denied:

Now, therefore, by virtue of the law and by reason of the premises, it is ordered that this cause be and the same is hereby dismissed.

Judgment entered May 26th, 1914.

WALTER B. MALING, *Clerk.*

44 In the District Court of the United States, in and for the Northern District of California.

No. 15655.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of California, at San Quentin, etc., Appellee.

Appeal and Allowance of Same.

In the above entitled cause, the said George D. Collins conceiving himself aggrieved by the order and judgment made and entered therein on the 26th day of May, A. D. 1914, doth hereby appeal from the said order and judgment to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors, herewith filed, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers in the said cause, and upon which said judgment and order were made, duly authenticated, be sent to the Supreme Court of the United States, upon this appeal.

Dated, this 1st day of June, A. D. 1914.

GEORGE D. COLLINS,
Appellant, Pro Se.

45 The foregoing appeal is hereby allowed by the District Court of the United States, in and for the Northern District of California, and it is by the said Court certified there is probable cause for the said allowance of said appeal, and for said appeal.

It is ordered the bond on appeal for costs, be, and the same is hereby, fixed in the sum of Two Hundred Dollars.

Done in open Court this 2 day of June, A. D. 1914.

M. T. DOOLING,
United States District Judge.

(Endorsed:) Filed, Jun- 2 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

46 In the Supreme Court of the United States.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, etc., Appellee.

Assignment of Errors.

Afterwards, to-wit: on the 1st day of June, A. D. 1914, at the October Term of the year Nineteen Hundred and Thirteen, of the

Supreme Court of the United States, at the Capitol in the City of Washington, District of Columbia, comes said George D. Collins and says that in the record and proceedings in the above entitled cause in the District Court of the United States, in and for the Northern District of California, there is manifest error in this, to-wit:

1. That the said District Court of the United States committed manifest error in refusing to grant the said appellant the Writ of Habeas Corpus, and in refusing to release or discharge him from the imprisonment averred in the complaint.

47 2. That the said District Court of the United States committed manifest error in deciding that the said appellant is not entitled to his liberty upon Habeas Corpus issuing out of and under the seal of the District Court of the United States, in and for the Northern District of California.

3. That the said District Court of the United States committed manifest error in denying the application of the appellant for the Writ of Habeas Corpus.

4. That the said District Court of the United States committed manifest error in declining to grant to appellant the Writ of Habeas Corpus.

5. That the said District Court of the United States committed manifest error in deciding that the appellant is not deprived of his liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

6. That the said District Court of the United States committed manifest error in deciding that the appellant was not denied by the State of California, the equal protection of the laws thereof, in contravention and violation of the Fourteenth Amendment of the Constitution of the United States.

7. That the said District Court of the United States committed manifest error in deciding that the appellant is not imprisoned in violation of the Thirteenth Amendment of the Constitution of the United States.

8. That the said District Court of the United States committed manifest error in deciding that the appellant is not imprisoned in violation of the treaty of extradition between the United States and Great Britain, nor in violation of his treaty right to return to the country whence he was taken upon the extradition.

48 9. That the said District Court of the United States committed manifest error in deciding that the prosecution and proceedings against appellant by the State of California, and averred in the complaint for Habeas Corpus, were not and are not in violation of the extradition jurisdiction over his person, vested in the United States.

10. That the said District Court of the United States committed manifest error in deciding that the appellant is not imprisoned in violation of international law.

11. That the said District Court of the United States committed manifest error in deciding that in the conviction of appellant the State of California did not deny him the equal protection of the

laws of said State, contrary to the Fourteenth Amendment of the Constitution of the United States.

12. That the said District Court of the United States committed manifest error in deciding that in the sentence and judgment against appellant, the State of California, did not deny him the equal protection of the laws of said State, contrary to the Fourteenth Amendment of the Constitution of the United States.

13. That the said District Court of the United States committed manifest error in deciding that in the trial of the appellant, the State of California did not deny him the due process of law secured to him by the Fourteenth Amendment of the Constitution of the United States.

14. That the said District Court of the United States committed manifest error in deciding that section one hundred and twenty six of the Penal Code of the State of California is not in violation of the Fourteenth Amendment of the Constitution of the United States.

49 15. That the said District Court of the United States committed manifest error in deciding that the trial, conviction and sentence of appellant were by a court of competent judicature of the State of California.

16. That the said District Court of the United States committed manifest error in deciding that appellant was not arbitrarily denied a valid defense to the accusation, to-wit: a defense legally sufficient to the charge against him and legally establishing his innocence.

17. That the said District Court of the United States committed manifest error in deciding that the sentence against appellant is not excessive, and in deciding that such sentence is not cruel or unusual punishment in violation of section 6 of article 1 of the Constitution of the State of California, and in violation of the Fourteenth Amendment of the Constitution of the United States, in the particulars averred in the complaint for Habeas Corpus.

18. That the said District Court of the United States committed manifest error in deciding that the sentence and imprisonment are not in violation of the Eighth Amendment of the Constitution of the United States.

19. That the said District Court of the United States committed manifest error in deciding that the jurisdiction over the offense charged against appellant is in the courts of the State of California and not exclusively in the District Court of the United States.

20. That the said District Court of the United States committed manifest error in deciding that the appellant is not imprisoned in violation of the Constitution and laws and treaty of the United States, in the particulars averred in the complaint for Habeas

50 Corpus.

21. That the said District Court of the United States committed manifest error in deciding that the appellant was not convicted in violation of the Constitution and laws and treaty of the United States, in particulars averred in the complaint for Habeas Corpus.

22. That the said District Court of the United States committed

manifest error in deciding that the sentence against appellant is not in violation of the Constitution and laws and treaty of the United States, in the particulars averred in the complaint for Habeas Corpus.

23. That the said District Court of the United States committed manifest error in deciding that the sentence against appellant is not an illegal obstruction to his treaty right of return to the country whence he was extradited.

24. That the said District Court of the United States committed manifest error in deciding that the imprisonment of appellant is not unlawful because an illegal obstruction to his treaty right to return to the country whence he was extradited.

25. That according to the Constitution, laws and treaty of the United States, the said appellant is of right entitled to the Writ of Habeas Corpus issuing out of and under the seal of the District Court of the United States, in and for the Northern District of California, and is in law entitled to his discharge from imprisonment, upon such Writ of Habeas Corpus. Whereas, by law of the land, the Order and Judgment of the said District Court of the United States, in and for the Northern District of California, should have been in favor of the said appellant and against the said appellee,

51 granting to appellant the Writ of Habeas Corpus, and upon such Writ restoring him to his liberty and discharging him from imprisonment.

Wherefore, the said appellant now prays that the Order and Judgment of the said District Court of the United States in and for the Northern District of California, be reversed, annulled and altogether held for naught, and that he be restored to all things he hath lost by reason of said Order and Judgment, and that the said District Court of the United States be directed to order and adjudge that the said appellant be discharged and restored to his liberty.

GEORGE D. COLLINS,
Appellant, Pro Se.

(Endorsed:) Filed Jun- 2, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

52 In the District Court of the United States in and for the Northern District of California.

No. 15655.

GEORGE D. COLLINS, Plaintiff,
vs.
JAMES A. JOHNSTON, the Warden, etc., Defendant.

Certificate to Record on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing Fifty-one (51) pages, numbered from 1 to 51, inclusive, to be a full, true and correct copy of the record and pro-

ceedings in the above entitled matter, and that the same constitute the record on appeal to the Supreme Court of the United States.

I further certify that the cost of the foregoing transcript of record is $29.70; that said amount has been paid by the plaintiff; and that the original citation issued herein is annexed hereto.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of July, A. D. 1914.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk United States District Court,
Northern District of California.

53 In the District Court of the United States in and for the Northern District of California.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, etc., Appellee.

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to James A. Johnston, the warden of the State Prison of the State of California, at San Quentin, in the County of Marin, Northern District of California, appellee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, on the 10th day of August A. D. 1914, pursuant to an appeal duly allowed by the District Court of the United States, in and for the Northern District of California, and filed in the Clerk's office of the said District Court, in a cause wherein George D. Collins is appellant, and you are the appellee, to show cause if any you have, why the order and judgment rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Maurice T. Dooling, Judge of the District Court of the United States, in and for the Northern District
54 of California, and the seal of the Court, this the 11th day June A. D. 1914.

M. T. DOOLING,
United States District Judge.

Attest:

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

Service on the appellee, of the foregoing citation, is hereby acknowledged this 12th day of June, A. D. 1914, at San Quentin, County of Marin, Northern District of California.

JAMES A. JOHNSTON,
Appellee, Warden, etc.

55 [Endorsed:] No. 15655. In the District Court of the United States, Northern District of California. George D. Collins, Appellant, vs. James A. Johnston, the Warden of the State Prison of the State of California at San Quentin, etc., Appellee. Citation on Appeal. Filed June 24, 1914. Walter B. Maling, Clerk.

Endorsed on cover: File No. 24,338. N. California D. C. U. S. Term No. 594. George D. Collins, appellant, vs. James A. Johnston, warden of the State prison of the State of California, at San Quentin, &c. Filed August 10, 1914. File No. 24,338.

In the Supreme Court of the United States.

No. 594, October Term, A. D. 1914.

GEORGE D. COLLINS, Appellant,

vs.

JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, in the County of Marin, Northern District of California, Appellee.

Certificate of Clerk and Stipulation of Parties in Correction of Errors in Printed Transcript of Record.

UNITED STATES OF AMERICA,
Northern District of California, ss:

To the Honorable the Supreme Court of the United States:

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify to the following portions of the record on file in said District Court of the United States in the above entitled cause, in correction of the printed transcript of record filed in the Supreme Court of the United States, in said cause, viz.:

1. The word "Ptison" on the 27th line of page three of the printed record, is the word "Prison" in the original record on file in said cause, in the said United States District Court.

2. The word "that" on the 28th line of page five of the printed record, is the word "at" in the original record on file in said cause, in the said United States Court.

3. The word "abritrary" on the 3d line of page seven of the printed record, is the word "arbitrary" in the original record on file in said cause, in the said United States District Court.

4. That the word "if" on the 10th line of page seven of the printed record, is the word "is" in the original record on file in said cause, in the said United States District Court.

5. That the word "effected" on the 19th line of page eight of the printed record is the word "effectual" in the original record on file in said cause, in the said United States District Court.

6. That the word "setnence" on the 42nd line of page nine of the printed record is the word "sentence" in the original record on file in said cause, in the said United States District Court.

7. That after the word "Thirteenth" on the 3d line from the bottom of page twelve of the printed record, the words, "and Fourteenth" are in the original record on file in said cause, in the said United States District Court, the sentence therein reading as follows, to-wit: "in contravention of the Thirteenth and Fourteenth Amendments of the Constitution of the United States," etc.

8. That after the word "extradition" on the 12th line from the bottom of page fourteen of the printed record, the words, "and also the said extradition case," have been omitted. The said words "and also the said extradition case," are in the original record on file in said cause, in the said United States District Court, the sentence therein reading as follows, to-wit:

"That thereafter and on the 12th day of July A. D. 1909 the said charge of perjury, the basis of the said extradition, and also the said extradition case, were upon motion of the prosecution and of said State of California, dismissed by the court in which the same were pending, to-wit: the Superior Court in and for said City and County of San Francisco."

9. On the second line of page fifteen of the printed record, the letter "a" is the word "in" as shown in the original record on file in said cause, in the said United States District Court.

10. On the 20th line of page fifteen of the printed record, after the word "illegally," the next word "and," appearing in said printed record, should be omitted, as it is not contained in the original record on file in said cause, in the said United States District Court.

11. In the fourth line of page seventeen of the printed record, and again on lines eleven, sixteen, and twenty-three of the same page, the word "goal," is "gaol," in the original record on file in said cause in said United States District Court.

12. On the fifth line from the bottom of page seventeen of the printed record, the word "an" is "and" in the original record on file in said cause, in said United States District Court.

13. On the second line from the bottom of page seventeen of the printed record, the word "recieve" is the word "receive" in the original record on file in said cause, in the said United States District Court.

14. On the eleventh line of page eighteen of the printed record, the word "is" should be "his." The word is "his" in the original record on file in said United States District Court, in said cause.

15. On the twenty-sixth line of page eighteen of the printed record, the word "proceedings" is "proceeding" in the original record on file in said cause, in said United States District Court.

W. B. M., Clerk. [16. On the eighth line from the bottom of page eighteen of the printed record, the word "nor," is the word "not" in the original [The original]*

W. B. M., Clerk. record on file in said cause in the said United States District Court.]*

17. On the sixth line from the bottom of page eighteen of the printed record, the word "this," is the word "the" in the original record on file in said cause, in the said United States District Court.

18. On the tenth line of page twenty of the printed record, next after the word "both," the original record on file in said cause in said United States District Court, contains the words, "section six of Article One of the Constitution of the", and after the word "Constitution" on line eleven of the same page, in the said printed record,

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[* Words and figures enclosed in brackets erased in copy.]

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there should be stricken out from the said printed record, the words, "section 6 of Article 1 of the Constitution," as they do not appear in the said original record in reference to the Constitution of the United States, but do appear as above indicated, in reference to the Constitution of the State of California.

19. On the 27th line of page twenty-one of the printed record, the word "property" should be "properly." The original record on file in said cause, in the said United States District Court, shows that the word is "properly" and not "property."

20. On the second line of page twenty two of the printed record, the word "restored" is the word "resorted" in the original record on file in said cause, in the said United States District Court.

21. On page twenty-four of the said printed record, the appeal is there erroneously stated to be from "the said order and judgment of the Supreme Court of the United States," whereas in the original record on file in said cause, in said United States District Court, the appeal therein set forth and filed and allowed in the said cause, expressly states that it is from "the said order and judgment, to the Supreme Court of the United States." That said appeal and the allowance thereof, and the filing of the same as shown of record in said cause, in the said United States District Court, are as follows to-wit:

"In the District Court of the United States in and for the Northern District of California.

No. 15655.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of California, at San Quentin, etc., Appellee.

Appeal and Allowance of Same.

In the above-entitled cause, the said George D. Collins conceiving himself aggrieved by the order and judgment made and entered therein on the 26th day of May A. D., 1914, doth hereby appeal from the said order and judgment to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, herewith filed, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers in the said cause, and upon which said judgment and order were made, duly authenticated, be sent to the Supreme Court of the United States, upon this Appeal.

Dated: this 1st day of June, A. D. 1914.

(Signed) GEORGE D. COLLINS,
Appellant Pro Se.

The foregoing appeal is hereby allowed by the District Court of the United States in and for the Northern District of California, and

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it is by the said Court certified there is probable cause for the said allowance of said appeal and for said appeal.

It is ordered the bond on appeal for costs, be and the same is hereby fixed in the sum of two hundred dollars.

Done in open Court, this the 2 day of June A. D. 1914.

(Signed) M. T. DOOLING,
United States District Judge."

That the said appeal and allowance thereof are endorsed as follows: "Filed June 2nd, 1914. W. B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk."

That the said appeal and the said allowance thereof were duly filed in said cause in the said District Court of the United States in and for the Northern District of California on the said 2nd day of June, A. D. 1914.

And it is hereby further certified that each and all of the matters herein stated as being a part of the original record on file in said cause in the said United States District Court, are to the extent herein specified, full, true and correct copies of said record therein, and full, true and correct statements of the contents of the said original record in the particulars set forth. Further, that the purpose of this certificate is to correct the errors, occurring in the printed transcript of record as filed in the Supreme Court of the United States, in the said particulars herein set forth and specified.

In witness whereof, I have hereunto set my hand and affixed the seal of the said District Court of the United States in and for the Northern District of California, this 9th day of October, A. D. 1914.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the United States District Court in and for the Northern District of California.

In the Supreme Court of the United States.

No. 594, October Term, A. D. 1914.

GEORGE D. COLLINS, Appellant,
vs.
JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, in the County of Marin, Northern District of California, Appellee.

Stipulation.

UNITED STATES OF AMERICA,
Northern District of California, ss:

We, hereby stipulate that the printed transcript of record on the appeal in this cause entitled "George D. Collins appellant, vs. James A. Johnston, the warden of the State Prison of the State of Cali-

fornia, at San Quentin, in the County of Marin, Northern District of California, appellee," numbered 594, October Term A. D. 1914, in the Supreme Court of the United States, be corrected in conformity with the foregoing certificate of the Clerk of the United States District Court, without need of motion in suggestion of diminution of record, or for certiorari.

GEORGE D. COLLINS,
Counsel for Appellant.
U. S. WEBB, *Attorney General,*
Counsel for Appellee.

Dated: This 12th day of October, A. D. 1914.

[Endorsed:] 594/24338. #594. October Term, A. D. 1914. In the Supreme Court of the United States. George D. Collins, Appellant, vs. James A. Johnston, the Warden of the State Prison, of the State of California, at San Quentin, in the County of Marin, Northern District of California, Appellee. Certificate of Clerk and Stipulation correcting certain errors in the printed transcript of the record.

[Endorsed:] File No. 24,338. Supreme Court U. S., October term, 1914. Term No. 594. George D. Collins, appellant, vs. James A. Johnston, Warden, etc. Stipulation correcting record. Filed October 19, 1914.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1914.

No. 594.

GEORGE D. COLLINS, APPELLANT,

vs.

JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, COUNTY OF MARIN, NORTHERN DISTRICT OF CALIFORNIA, APPELLEE.

MOTION TO ADVANCE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States, and to the Court:

Comes now the appellant in the above-entitled cause and presents this his motion to your honorable court, that said cause, to wit: the appeal therein, be ordered advanced to an early hearing, upon the ground that the case involves the question whether the existing imprisonment of the appellant in the State prison of the State of California is in violation of the Constitution, laws, and treaty of the United

States in the particulars specified in the complaint or petition for the writ of *habeas corpus,* set forth in the record on the appeal herein, now on file in your honorable court. That said appeal is from the final judgment of the District Court of the United States in and for the Northern District of California refusing to grant the appellant a writ of *habeas corpus* for his release and discharge from said imprisonment. That said case involves the validity of certain proceedings in the courts of said State of California résulting in the alleged conviction of appellant upon a criminal charge, to wit: a charge of perjury, and is, therefore, substantially a criminal case within the meaning of subdivision three of rule twenty-six of your honorable court. That appellant's present and existing imprisonment is a continuation of the same imprisonment averred in said complaint or petition for *habeas corpus,* and is in execution of what purports to be a judgment of the Superior Court in and for the City and County of San Francisco, sentencing the appellant to said imprisonment for the term of fourteen years, upon said conviction. That it is the contention of appellant that said judgment and imprisonment are in violation of the Constitution, laws, and treaty of the United States, in the particulars set forth in said complaint or petition for *habeas corpus,* hereby specially referred to and made part hereof, and that the case is one entitling him on the facts pleaded in said complaint or petition, to the writ of *habeas corpus* from the United States District Court in and for the Northern District of California, and to his release and discharge from said imprisonment, upon the writ, and this, on the various grounds and for the various reasons set forth in said complaint or petition, and in the appellant's brief on file herein. That said brief and the argument therein presented, are hereby specially referred to, and made part hereof. That it is the purpose of appellant to submit his case on said appeal to your honorable court, upon the said brief and argument, and to make no oral argument, as he deems the case fully and adequately

presented in the said brief. That this motion to advance said cause is made upon the printed transcript of the record, on file therein, and also upon appellant's printed brief and argument, filed in your honorable court in said cause.

Wherefore appellant respectfully makes and submits this his motion to your honorable court, and asks that the same be granted; that accordingly it be ordered that said cause be advanced to an early hearing on a day specified.

GEORGE D. COLLINS,
Counsel for Appellant.

Dated at Washington, in the District of Columbia, October term, A. D. 1914.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 594.

GEORGE D. COLLINS, APPELLANT,

vs.

JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, COUNTY OF MARIN, NORTHERN DISTRICT OF CALIFORNIA, APPELLEE.

BRIEF AND ARGUMENT FOR APPELLANT.

I.

Opening Statement.

This is an appeal from a final judgment rendered by the United States District Court, Northern District of California, refusing to grant the appellant the writ of *habeas corpus ad subjiciendum* for his release from imprisonment in the State prison of the State of California, at San Quentin, in the County of Marin, Northern District of California. The imprisonment is under State process; the appellant contends it is in violation of the Constitution, laws, and treaty of the

United States, in the several particulars specified in the complaint or petition for the writ. The appeal was duly allowed by the district court, and a certificate of probable cause granted. The case comes before the Supreme Court of the United States upon the complaint or petition for *habeas corpus*, the judgment denying the petition, the appeal from the judgment, the allowance of the appeal, the certificate of probable cause, the assignment of errors, and the specification of errors set forth in this brief. *The question presented is exclusively one of law, to wit: Whether the complaint or petition for habeas corpus makes out a prima facie case.* If it does, then the judgment appealed from must be reversed. All the questions raised are Federal in nature and extent, requiring for their decision the application of the Constitution, laws, and treaty of the United States, and certain well-settled principles of international law. The imprisonment is by virtue of what purports to be a certified copy of a judgment of the Superior Court of the State of California, in and for the city and county of San Francisco, whereby and wherein it is stated the appellant was convicted of the crime of perjury, and is therefore sentenced to imprisonment in the State prison at San Quentin for the term of fourteen years—a monstrous penalty, in itself strongly suggestive of the gross unfairness and embittered prejudice that dominated the trial and induced the conviction. Every remedy provided by the State, to wit: *Appeal and habeas corpus*, has been invoked by the petitioner, but without avail. He not only was refused relief, but the State appellate courts, for reasons ultra-judicial and purely personal, arbitrarily declined to pass upon any of the Federal questions raised, thus perforce compelling him to seek the remedy of *habeas corpus* from the United States District Court, there being no such thing in law as mandamus from a Federal court to compel a decision of Federal questions by the State courts. Apart from this there are certain Federal questions presented of a nature making it the duty of the United

States District Court to take cognizance of the case *in the first instance, and irrespective of whether relief* had first been sought in the State courts or whether the writ of error would issue. Manifestly, the writ of error would not issue to the State court if the latter failed or refused to pass upon any of the Federal questions raised. The United States District Court rendered no opinion in the case, but denied the petition, without giving any reason for the decision.

II.

Points Raised by the Record.

A preliminary and general statement of the points raised by the record will serve to indicate the nature of the case presented. It is contended on this appeal:

1. That on the facts appearing in the record it was incumbent on the United States District Court to grant the writ of *habeas corpus*, as a duty devolving upon the court, of mandatory obligation prescribed by the Constitution and laws of the United States, and on the following points:

2. That the State courts arbitrarily deprived the appellant of a perfectly valid and legally sufficient defense to the accusation—a defense going to the merits, and in law establishing that the accused is legally innocent of the crime charged against him, therefore necessitating his acquittal; that the arbitrary deprivation of such a defense is a denial of the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States.

3. That the arbitrary deprivation of such a defense is also the denial of the equal protection of the laws of the State, in violation of the Fourteenth Amendment.

4. That the "trial court" was not a court of competent judicature of the State of California, nor a legally constituted tribunal vested by the laws of the State with competent jurisdiction over the person and subject-matter. Therefore its proceedings and judgment are null and void, and no authority in law for the imprisonment of appellant; that a competent court, legally established and vested with the requisite jurisdiction over the person and subject-matter, is indispensable to the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States.

5. That a law of the State, adopted long subsequently to the trial, conviction and sentence of appellant, and so construed as to invest the "trial court," in the case of appellant, with the necessary jurisdiction, is an *ex post facto* law, and prohibited by section 10 of article 1 of the Constitution of the United States.

6. That the sentence and imprisonment are grossly and atrociously excessive; therefore prohibited by the constitution of the State in section 6 of article 1; also by the State statute; also by the Eighth Amendment of the Constitution of the United States upon the special facts pleaded in relation to the law of the extradition; also by the Fourteenth Amendment of the Constitution of the United States in prohibiting the deprivation of liberty without *due process of law,* and prohibiting the denial of the equal protection of the law.

7. That if the State statute is construed to authorize the sentence, it is in violation of the Fourteenth Amendment in the particulars specified in the complaint or petition for *habeas corpus* appearing in the record, and is also in violation of section 6 of article 1 of the State constitution.

8. That whether the imprisonment is illegal because in violation of the Constitution of the United States, or illegal

because in violation of the law of the State, it is thereby an unlawful interference with and obstruction to the *treaty right* of return to the country granting the extradition, the extradition case having been dismissed by the prosecution; therefore to be remedied by *habeas corpus* from the United States District Court in enforcement of the treaty and the law of the extradition, irrespective of any recourse or right of recourse to the State courts for redress.

9. That the imprisonment is in violation of the extradition treaty between the United States and Great Britain; also in violation of the Canadian Extradition Act, passed pursuant to section 6 of the treaty.

10. That the imprisonment is in violation of section 5275 of the Revised Statutes of the United States, and of international law.

11. That the imprisonment is in violation of the law of the extradition and of the extradition jurisdiction held by the United States over the person of appellant *in custodia legis*, in execution of the treaty, and in enforcement of the dominant purpose of the extradition.

12. That the imprisonment is in violation of the Thirteenth Amendment of the Constitution of the United States in the particulars specified in the complaint or petition for *habeas corpus* appearing in the record on this appeal. These and other related Federal questions are presented by the record, and are more specially set forth in detail and at greater length in the portion of this brief containing an enumeration of the questions raised, and also in the specification of errors.

III.

General Outline of Case.

In general outline the case is this: There were two connected perjury indictments against appellant, so intimately and inseparably related that acquittal on the first would bar the prosecution on the second; they were both based on the same proposition, to wit, that on the 15th day of May, 1889, a certain marriage ceremony occurred between the prosecutrix and appellant; on this as the basic fact, the first indictment alleged a marriage—a legal and valid marriage, the gist of the charge; so similarly, the second indictment alleged the same ceremony as the basis of the accusation, but did not allege that it constituted a legal or valid or any marriage. In other words, the first indictment charged perjury in taking oath that no marriage occurred between the prosecutrix and the appellant on May 15, 1889—the prosecution relying entirely on the ceremony of that date to establish a marriage—and the second perjury indictment charged the offense as having been committed in the trial of the first perjury indictment in taking oath that the ceremony was not with the prosecutrix, but with another person. The first indictment was filed in the Superior Court at San Francisco on July 13, 1905. The second indictment was filed in the same court on December 29, 1905. The first indictment was made the basis of extradition proceedings under the treaty of extradition between the United States and Great Britain; after appellant's extradition was obtained and after failure to secure a conviction, the case was dismissed on motion of the prosecution. The second or derivative indictment is the one upon which the appellant was convicted after a very unfair and illegal trial, and is the basis of the existing imprisonment. The gist of the extradition indictment is that the accused committed perjury in making denial of *valid and legal marriage* in his sworn pleading, to wit, his

answer to a complaint in a civil suit brought against him in May, 1905, by the prosecutrix, as plaintiff, for support and maintenance, pursuant to the provisions of section 137 of the Civil Code of California, which, so far as pertinent here, is as follows:

> "When the wife has any cause of action for di-
> "vorce, as provided in section ninety-two of this Code,
> "she may without applying for a divorce, maintain
> "in the superior court an action against the husband
> "for permanent support and maintenance of herself
> "or of herself and children."

This is the statute as it stood at the time of the commencement of the civil suit in May, 1905. Section 92, referred to in this statute, specified the grounds for divorce and dissolution of marriage. Manifestly only a valid or legal marriage, and not a void one, would sustain a suit under the above-quoted provision of section 137 of the Civil Code. Therefore the plaintiff alleged a *valid and legal marriage* in her bill of complaint. The defendant tendered issue upon the averment by denying in his sworn answer that any such marriage existed between him and the prosecutrix. As stated, it is this denial in a pleading that constituted the basis of the perjury charge in the initial or parent perjury indictment, to wit, the extradition case, from which and through which is derived the second perjury accusation. The civil suit was never brought to trial or judgment, but was abandoned and discontinued by the plaintiff because unsustainable on the merits. *The gist of the second or derivative perjury indictment is that the appellant committed perjury in testifying as a witness in the trial of the extradition case, that a certain void marriage ceremony of date May 15, 1889, was not with the prosecutrix, but with another person.* We say a "void marriage ceremony," because not only does the record show it to be void (Record, pp. 4, 5, 7), and void by statute, but the uncontradicted facts establishing its illegality were testified to by the accused upon the trial of the extradition case, and not disputed nor included in the assignment of

perjury in the second or derivative perjury indictment, the basis of the conviction, sentence, and existing imprisonment. This of itself and according to well-settled doctrine is an admission by the prosecution of the truth of the testimony, just as completely and to the same extent as if it had been fully set forth in the second perjury indictment in conjunction with the specially assigned testimony that the prosecutrix was not a party to the void marriage ceremony of May 15, 1889, and the assignment of perjury thereupon restricted as it is to the latter portion of the testimony. Upon this point the authorities are unanimous.

Says Wharton:

> "It is only necessary to negative such parts as the "prosecutor can falsify, admitting the truth of the "rest."
>
> *2 Wharton's Crim. Law,* sec. 1300, 10th ed.; sec. 1564, 11th ed.
>
> *State vs. Faulkner,* 175 Mo., 546, 601.
>
> *2 Archb. Cr. Prac. and Pl.,* p. 965 and note.

It is the legal right of the accused to have the benefit of this admission, and to have all his testimony as given by him in the extradition case on the subject of marriage construed together and as an entirety—especially the portion relative to the undisputed and conceded pre-existing common-law marriage, as constituting an annulment in law, of the associated testimony assigned as perjury in the second perjury indictment in respect to the marriage ceremony of May 15, 1889, declared void by section 61 of the Civil Code of California if taken as a marriage or marriage ceremony with the prosecutrix.

2 Whart. Crim. Law, sec. 1570, 11th ed.

Therefore, if the accused had agreed with the contention of the prosecution, and accordingly testified in the trial of the extradition case that the prosecutrix was in truth and in fact a party to the marriage ceremony of May 15, 1889, instead of testifying as he did that she was not a party thereto, the

ceremony would anyway be void as a marriage in law, declared void by section 61 of the Civil Code of California, for the very reason that she was a party to the ceremony. In other words, the ceremony with her would not tend to support the basic averment in the extradition indictment that there existed a legal and valid marriage between her and the defendant; therefore testimony that she was *not* a party to it would really be of the same legal import as if she were in fact a party. In either event, the ceremony would not constitute a legal or valid marriage with her, and this in itself would make the question altogether irrelevant in the extradition case as to whether she were or were not a party to the void marriage ceremony of May 15, 1889; nor would testimony that she was *not* a party to the ceremony tend to prove that it was void as a marriage with her and thus controvert the averment of legal and valid marriage in the extradition indictment. Only testimony that she was a party to the ceremony would have that effect; but the defendant is not accused of giving any such testimony; on the contrary, the charge is that he falsely testified she was not a party to the ceremony of May 15, 1889. Testimony tending to show or showing the marriage ceremony void as a legal marriage with the prosecutrix, to wit, the testimony of defendant given in the extradition case, establishing the pre-existing common-law marriage with another, would be very relevant and very material, and, if false, would undoubtedly be perjury in the case where given. However, there is no such charge and no such assignment of perjury. So, too, the case would be different, if the charge were one of perjury in giving false testimony that the prosecutrix was not a party to a ceremony perfectly valid as a legal marriage with the defendant on May 15, 1889—in other words, if the charge were of false testimony in denying a *legal marriage* with the prosecutrix instead of a charge of denying a marriage ceremony with her, that was not of sufficient legal efficacy to warrant the prosecution in alleging in the second perjury indictment that it constituted a marriage

with her or made the parties husband and wife. There is no attempt at averment in the second perjury indictment that the parties intermarried or became husband and wife. The omission of such an averment was deliberate and intentional, for the very purpose of avoiding the question of marriage that had proved so disastrous to the prosecution in the extradition case, insuperably preventing a conviction there, and elsewhere made it impossible for the prosecutrix to maintain the civil suit for support and maintenance. From the mere averment of a marriage ceremony it is not permitted to conclude there was a legal and valid marriage; there may be a marriage ceremony and no marriage. The second perjury indictment *does not* charge the accused with falsely denying a marriage, as did the extradition charge; but only with falsely denying a mere marriage ceremony, not at all necessarily constituting a legal marriage. The rule of criminal pleading is elementary that what is not averred is to be taken as not existing:

> "In the spirit of that principle which presumes "innocence until guilt be established, we infer that "what is not charged in an indictment does not "exist; and it is the business of the pleader to ex- "clude by proper averments, the conclusions to which "the accused is thus entitled."
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> *Mears vs. Com.*, 2 Grant's Cas., 387.
> *People vs. Terrill*, 127 Cal., 100.

> "The presumption is that what is not charged in "the indictment does not exist."
>
> *State vs. Faulkner*, 175 Mo., 601.

As no marriage is alleged in the second perjury indictment to be the result of the ceremony there pleaded, the conclusion is and must be that no legal marriage occurred. There is but one presumption in a criminal case, and that is the presumption of innocence; it applies as much to the indictment as it does to the evidence.

People vs. Griffith, 122 Cal., 214.
People vs. Strassman, 112 Cal., 683, 687.
People vs. Douglass, 100 Cal., 1.

Nor will the absent averment be supplied by implication or intendment, as there is no such thing known to the law as a constructive accusation of crime.

Pettibone vs. United States, 148 U. S., 197.
People vs. Dunlap, 113 Cal., 75.
People vs. Robles, 117 Cal., 682.

In fact, and as indicated in the record, the point of differentiation between the first and second perjury indictments is in the averment of valid marriage in the former, and its absence in the latter.

In the absence of an express averment of legal marriage with the prosecutrix or that by means of the ceremony averred in the second indictment, the parties intermarried and became husband and wife, the law deems it to be no marriage; and such, too, is the construction placed upon the second perjury indictment by the prosecution and the State courts (Rec., p. 5). Now, if no marriage, that is, no *legal* marriage, resulted from the ceremony pleaded in the second indictment, then clearly false testimony that the prosecutrix was not a party to the ceremony of May 15, 1889, would not be perjury in the extradition case, where only a legal and valid marriage could sustain the charge of perjury there made. Therefore it was a perfect and conclusive defense to the second perjury indictment that the ceremony therein pleaded and made the basis of the charge was *void* as a marriage by express declaration of section 61 of the Civil Code of California, hereinafter quoted, and that therefore false testimony that the prosecutrix was not a party to the *void* ceremony would not be perjury in the extradition case. So, too, this constituted a perfect and conclusive defense to the second perjury charge, even if the second perjury indictment had expressly alleged a legal marriage with the prosecutrix as the result of the ceremony there pleaded. If the ceremony was *void* as a marriage with the prosecutrix by statutory denunciation, there could be no perjury in false

testimony that she was not a party to it; for there is no principle of criminal law more elementary than that false testimony to what the statute declares a *nullity* in any event is no perjury, but itself a nullity.

2 Whart. Crim. Law, sec. 1282, 10th ed.; sec. 1546, 11th ed.

As indicated in the record, the defendant testified in the trial of the extradition case, in the Superior Court at San Francisco, as an incidental circumstance of really no legal importance or relevancy in the case, that the prosecutrix was not a party to the marriage ceremony of May 15, 1889, relied upon by the prosecution to establish in the extradition case (but not in the second perjury case) a valid and legal marriage with her, and he further testified to the effect, at the same time, and in the same connection, as the determinative fact in the extradition case, that were she a party to the ceremony it was *void* as a marriage, and so declared by section 61 of the Civil Code of California because of the perfectly valid and pre-existing common-law marriage between the defendant and a person other than the prosecutrix, to wit, Agnes Newman, stating in detail the facts constituting the previous marriage, and in substance as averred in the complaint or petition for *habeas corpus*, appearing in the record on this appeal. (See Record, pp. 4, 5, 7.)

If the defendant had testified that the prosecutrix *was* a party to the void marriage ceremony instead of testifying that she was not a party thereto, the result would be the same in the legal complexion of the case. The marriage would be absolutely null and void *ab initio* by express declaration of section 61 of the Civil Code of California, which, so far as pertinent here, is as follows, viz:

> "A subsequent marriage contracted by any person "during the life of a former husband or wife of "such person, with any person other than such "former husband or wife, is illegal and void from "the beginning," unless the former marriage had been annulled or dissolved

This, however, with a saving clause in section 1387 of the same code that the children of all marriages null in law are legitimate. It results from section 61 of the Civil Code that whether the prosecutrix was or was not a party to the *void* marriage ceremony of May 15, 1889, would not be relevant in the extradition case where the basic averment of the indictment is that of a legal and valid marriage with her.

Says Wharton:

> " It is when the false swearing goes to a point the "existence or non-existence of which cannot affect " the questions in dispute, that it does not tend to " prevent the due administration of justice, and there- " fore is not perjury."
>
> *2 Whart. Crim. Law,* sec. 1541, 11th ed.

As already indicated, the second or derivative perjury charge is purposely restricted by the prosecution to only so much of the testimony given by the accused, in the trial of the extradition case, as relates to *the identity of the parties participant in an undisputed void marriage ceremony,* and attempts no assignment of perjury in respect to the testimony showing the ceremony *void* as a marriage, by section 61 of the Civil Code. The point is this: In law there could be no perjury in the testimony given by the accused, in the trial of the extradition case, upon the subject of marriage unless it was committed in that portion of his testimony relative to the pre-existing common-law marriage to a person other than the prosecutrix. It is this undisputed common-law marriage that constituted the dominant and determinative fact in the extradition case, because it made any marriage ceremony with the prosecutrix, on May 15, 1889, absolutely null and void by section 61 of the Civil Code; therefore defeated the extradition indictment; necessarily requiring the acquittal of the accused, because it destroyed the basic averment therein of legal and valid marriage with her. Speaking of evidence sufficient to constitute perjury, Wharton says:

"The test is, was the evidence such as apparently
" conduced to support an hypothesis logically perti-
" nent to the issue? If not, the evidence in the sense
" now before us, is not material."
2 Whart. Crim. Law, sec. 1541, 11th ed.

The only primary hypothesis pertinent to the issue in the extradition case is that of *legal marriage* with the prosecutrix as the result of a valid marriage ceremony on May 15, 1889.

Manifestly, whether she were or were not *a party to a void marriage ceremony,* one declared void by section 61 of the Civil Code, is not a hypothesis pertinent to the issue in the extradition case, though it would be otherwise, and a pertinent secondary hypothesis, if the question were whether the marriage was void, *assuming the prosecutrix a party to it.* However, respecting this, there is no charge of perjury, and no assignment of perjury presenting it or making it relevant; this could only be possible by charging perjury on the testimony given by defendant in the trial of the extradition case relative to the pre-existing common-law marriage to a person other than the prosecutrix, and no such charge or assignment of perjury has ever been made or attempted. Clearly, if the marriage ceremony of May 15, 1889, is void by statute because with the prosecutrix, it cannot possibly, apparently or actually, or *prima facie* conduce to support any conceivable hypothesis that would be pertinent to the issue in the extradition case, *for the prosecution to show that she was a party to a void marriage ceremony, nor for the defendant to show that she was not a party thereto;* though it would be pertinent for him to show in defense that the marriage was *void,* as that would destroy the basic averment in the indictment—the extradition indictment of valid and legal marriage. Therefore his testimony in the extradition case relative to the pre-existing common-law marriage was there very relevant and very material as sustaining this defense to the extradition charge;

hence, if false, would support a valid assignment of perjury; but no such assignment or charge has ever been made—a most important fact, repeatedly pointed out in this brief, and to be constantly considered a conspicuous point in the case. Now, manifestly and as a self-evident proposition of law, it was a perfectly valid and legally conclusive defense to *the second or derivative perjury charge* that the marriage ceremony of May 15, 1889, were it with the prosecutrix, as alleged in the second perjury indictment, was void *ab initio* by section 61 of the Civil Code; therefore no perjury in the extradition case, and this upon the well-settled and quite elementary principle of the common law, already mentioned in this brief, *that false testimony relating to what the statute declares a nullity in any event, is no perjury, but itself a nullity.* It is considered an extrajudicial oath and impossible of prejudice or injury to any one; hence no perjury. On this decisive point the authorities are unanimous, and fully sustain it as one of elementary law.

2 Whart. Crim. Law, sec. 1282, 10th ed.; sec. 1546, 11th ed.
Crump vs. Com., 75 Va., 922, 923.
People vs. Collier, 48 Am. Dec., 699.
3 Coke's Institutes, 167.

The case of *Rex vs. Dunston,* 1 Ryan & M., 109, per Abbott, C. J., will also be found directly in point. See likewise *King vs. Benesch,* Peake's N. P., 93, per Lord Kenyon. Clearly if there were no *legal marriage* with the prosecutrix as the result of the ceremony of May 15, 1889, there were no perjury committed in the trial of the extradition case in falsely denying that she was a party to the void ceremony. This perfectly conclusive defense of nullity, therefore no perjury, was duly and regularly interposed by the appellant, together with proper tender of independent and adequate proofs to sustain and establish it; but on objection by the prosecution that they did not contend or charge in the

second perjury indictment that the ceremony with the prosecutrix constituted a legal or valid marriage with her, that the only question was whether she were a party to the actual ceremony, even if void, the trial court sustained the objection and overruled defendant's exception then and there urged, to wit, that he was thereby, in violation of the Fourteenth Amendment of the Constitution of the United States, arbitrarily denied a perfectly valid and legally sufficient defense to the charge—a defense going to the merits and necessitating his acquittal—and that he was thereby deprived of the *due process of law* and the equal protection of the law guaranteed him by the Fourteenth Amendment. The very ground upon which the interposed defense and proffered proofs were rejected is the very ground upon which the law required that the defense and the proofs establishing it be received and sustained, to wit, that the ceremony of May 15, 1889, was not, and as a matter of law could not, be a legal marriage with the prosecutrix, but was *void,* and so declared by section 61 of the Civil Code; that therefore it would make no difference in the extradition case whether she were a party to the void marriage ceremony or not; that consequently false testimony in the extradition case, to the effect that she were not a party to the void marriage ceremony, could not, in law, be made the competent or valid basis of a charge of perjury, as only a legal and valid marriage with her would sustain the extradition indictment.

The trial court arbitrarily rejected the proffered defense, in manifest violation of the defendant's constitutional right to the *due process of law* and the equal protection of the law, guaranteed by the Fourteenth Amendment, for it was a perfectly valid and legally conclusive defense, going to the merits on the second perjury charge; in law establishing that the accused is legally innocent of the offense, therefore entitled to an acquittal. Instead, he has been convicted and is imprisoned in execution of a monstrous sentence.

The imprisonment is not only in violation of the Four-

teenth Amendment of the Constitution of the United States, but because it is thus illegal, it is also in violation of the *treaty right* to return to the country granting the extradition, the extradition case having been dismissed on motion of the prosecution. In such cases *habeas corpus* will issue as of right from the United States District Court, in the first instance, to remove the unlawful interference with the due and proper exercise of the *treaty right,* and this whether or not application had been previously made to the State courts for relief.

In re Rauscher, 119 U. S., 407.
Cohn vs. Jones, 100 Fed. Rep., 639.
Mali vs. Hudson, 120 U. S., 1.
Spear on Extradition, 233, 234.

This treaty right of return is made by international law an implied stipulation in every treaty of extradition; it is also a right granted by sections 5272 and 5275 of the Revised Statutes of the United States. It therefore is not in any respect derived from the third article of the extradition convention of July 12, 1889, between the United States and Great Britain, where it is simply assumed to pre-exist, but is an implied provision of the Ashburton treaty of August 9, 1842; it is not limited to cases where there are prior offenses; it applies to every extradition case, even though there are neither prior nor subsequent offenses; and it applies where the subsequent offense has been finally terminated by dismissal, or acquittal, or service of sentence, or the imprisonment on the subsequent offense is held illegal or the conviction void. It is a very elementary doctrine in international law and has for its purpose the protection and enforcement of the reserved right of asylum incidental to every extradition pursuant to treaty. Sections 5272 and 5275, Revised Statutes United States, have been held declaratory of the same principle.

Johnson vs. Browne, 205 U. S., 309.
Cosgrove vs. Winney, 174 U. S., 64, 68, 69.

Article 3 of the Convention of July 12, 1889, is not a limitation of the treaty right of return by restricting it to cases where there are prior offenses, but is an affirmation *pro tanto* of the pre-existing right of return by requiring its exercise as a condition precedent to the barring of prosecutions for prior offenses. The right of return is conferred by implication in the Ashburton treaty of August 9, 1842, and not by article 3 of the Supplemental Convention of July 12, 1889, which deals entirely with trials for prior offenses, and not at all with the general *jus revertendi* of international law, which is made an implied condition of every extradition pursuant to treaty. Its postponement in operative effect until after the accused is finally discharged on the subsequent accusation is no destruction of the right. On the contrary, it then becomes legally available. So it will be perceived that not only is the question presented one of constitutional law, but it also involves a *treaty right,* for the enforcement of which the law makes it the imperative province and mandatory function of the United States District Court to grant the remedy of *habeas corpus* in the first instance, and without regard to any possible remedy in the State courts. The case comes within the well-settled class of exceptions to the usual rule. The point is taken up and discussed subsequently in this brief.

IV.

Further Statement of Case.

As already stated, the civil suit in which the initial oath was taken, to wit, the basis of the extradition charge of perjury, was abandoned by the plaintiff and discontinued without ever having been brought to trial or judgment. In any normal or regular administration of the law the fundamental question of marriage or no marriage was essentially a civil one, and should have been determined in

the civil suit, if the court had jurisdiction, and if no jurisdiction, then of course there could be no perjury in the answer to the complaint (*Ewingston's Case,* 2 Moody C. C., 223; *2 Whart. Crim. Law,* secs. 1521, 1536). The sinister scheme of transferring the trial of a question purely civil to a court of criminal jurisdiction has always been held reprehensible as a gross perversion of law and justice. The extradition case was dismissed July 12, 1909, on motion of the prosecution, because unsustainable, the prosecution meeting the same difficulty that confronted them in the civil suit, to wit, the impossibility of establishing a valid and legal marriage. To this day the determinative and paramount question of marriage remains undecided, and still awaits decision in some possible future litigation, yet to be instituted, if the occasion demands it. There was also a bigamy charge; but that was likewise dismissed by the prosecution, because manifestly untenable. The dismissal of the extradition case occurred since the former appeal, and has in consequence brought into important operation in the legal situation of the controversy the *treaty right of return,* and the question is presented whether the existing imprisonment is an unlawful obstruction to or invasion of that right, if such imprisonment is made illegal either by the Fourteenth Amendment in the particulars pointed out in the complaint or petition for *habeas corpus,* appearing in the record on this appeal, or by the constitution or laws of the State. Had the appellant been given a trial to a final conclusion upon the extradition charge, he would have been acquitted; and the acquittal would have been *res adjudicata* of an essential element in the derivative and second perjury case; hence a bar to the latter. It was therefore on these special facts a right conferred by the law of the extradition to obtain this adjudication in the extradition case, and in enforcement of the treaty right of return. We might be permitted to say, in passing, that if the acquittal or conviction in the extradition case would bar the prosecution on the second perjury charge, then,

clearly, the latter is not a subsequent offense committed subsequently to the extradition, so as to sustain a subsequent and independent prosecution within the doctrine of *Collins vs. O'Neil,* 214 U. S., 113. The two perjury indictments are so inseparably linked together, and the second one is so entirely derivative and dependent on the first, that if the accused is not guilty on the extradition charge he is necessarily not guilty on the subsequent or derivative charge. By dropping the extradition charge and substituting for it the second or derivative perjury indictment the scheme, if upheld, operates to defraud the accused of the legal rights granted him by the treaty and the paramount law of the extradition. The point, though raised, has heretofore escaped the attention of the courts in the previous litigation. The determinative facts pertaining to each of the Federal questions presented will be set forth in this brief in the argument relating to each point as it is discussed. However, it may be said at this time that the statement of the questions raised and the specification of errors which follow in regular sequence in this brief, will correctly indicate by way of index and in an epitomized form the facts as they appear in the record, to wit: in the complaint or petition for *habeas corpus.* The points made on this appeal, have not been heretofore passed on by the Federal courts in the preceding litigation, except possibly one, and that must be regarded as still open for discussion, since no question is settled until rightly decided. It is not necessary we make any comment on the very extraordinary attitude of the State courts toward the case or toward the appellant. We are only permitted to present the case as it appears on the face of the record. It is not relevant to discuss motives or ulterior purposes of an extrinsic nature. On this appeal the controversy is not with personal antagonisms, but with the deprivation of legal rights secured to the appellant by the Constitution, laws and treaty of the United States and well-settled principles of international law. If these legal rights exist, then it is

of no consequence to inquire concerning the motives or purposes involved in their deprivation. If these rights do not exist, the motives and purposes prompting their denial are equally and obviously impertinent. Of course it is natural to resent an atrocious injustice purposely contrived, but it would be the height of impropriety to indulge such resentment in a judicial proceeding for the enforcement and vindication of legal rights upon facts that must be taken as alleged in the record and upon propositions of law that must find their support in well-settled principles of Federal jurisprudence.

V.

The Questions Raised on This Appeal.

In the first place, there are no questions of fact, but only questions of law. In the state of the record presented on this appeal, the facts so far as pertinent to the points made for reversal of the judgment, *must, of course, be taken as alleged in the complaint or petition for the writ of habeas corpus, the question being whether the petition makes out a prima facie case for the granting of the writ by the United States District Court.* If it does, the judgment appealed from must be reversed. The questions of law relied upon and urged by the appellant on the facts pleaded in the complaint or petition for *habeas corpus* are as follows, viz:

1. Is the arbitrary denial or rejection by the State courts of a perfectly valid and legally sufficient defense to a criminal accusation—a defense going to the merits and in law establishing the innocence of the accused on the charge made against him, therefore necessitating his acquittal—a deprivation of the *due process of law* guaranteed him by the Fourteenth Amendment of the Constitution of the United States, or a deprivation of the equal protection of the law assured him by the same provision; and if it is, can relief

be had by *habeas corpus* from the resulting imprisonment on application to the United States District Court, when all remedies have been exhausted, without avail, in the State courts, or if the State courts arbitrarily refuse to pass on the Federal questions presented, and thus prevent recourse to a writ of error?

2. Is a trial, conviction or sentence to imprisonment by a "court" having no legal existence and destitute of all authority or jurisdiction as a court of competent judicature of the State *the due process of law* required by the Fourteenth Amendment of the Constitution of the United States or the equal protection of the law assured by the same provision; and, if not, can relief be had by *habeas corpus* on application to the United States District Court when all remedies have been exhausted without avail in the State courts, or if the State courts arbitrarily refuse to pass on the Federal questions raised, and thus prevent recourse to a writ of error?

3. Is a grossly excessive sentence to a long term in a State prison, if prohibited by the constitution of the State of California, and, therefore, constituting excess of jurisdiction, an imprisonment without *due process of law* within the meaning of the Fourteenth Amendment of the Constitution of the United States; or, irrespective of the inhibitions in the State constitution, is such a sentence, because grossly excessive and grossly disproportionate to the offense as limited by the facts of the case and the total absence of injury and of all possibility of injury to both public and private rights, a deprivation of liberty without *due process of law*, in violation of the Fourteenth Amendment of the Constitution of the United States; and, in either case, is the excessive sentence a denial of the equal protection of the laws of the State upon the facts pleaded in the complaint or petition for *habeas corpus* appearing in the record on this appeal,

especially if, as there shown, the case of the appellant is one that has been singled out and made an exception by the State courts to the usual penalty administered by them in similar or like cases; and can relief be had by *habeas corpus* on application to the United States District Court when all remedies have been exhausted, without avail, in the State courts, or if the State courts arbitrarily refuse to pass on the Federal questions raised, and thus prevent recourse to a writ of error?

4. Does a statute of the State, to wit, section 126 of the Penal Code of California, as administered and applied by the State courts to the case of appellant, deny him the equal protection of the laws of the State, contrary to the Fourteenth Amendment of the Constitution of the United States, or operate to deprive him of his liberty without due process of law, in violation of the same provision; and can relief be had by *habeas corpus* on application to the United States District Court when all remedies have been exhausted, without avail in the State courts, or if the State courts arbitrarily refuse to pass on the Federal questions raised, and thus prevent recourse to a writ of error

5. Is a statute so construed by the State courts as to permit the maximum penalty of fourteen years' imprisonment, in a case where only the minimum penalty of one year is reasonably or justly proportionate to the offense, if any, a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, or the deprivation of liberty without due process of law, contrary to the same provision; and can relief be had by *habeas corpus* on application to the United States District Court when all remedies have been exhausted, without avail in the State courts, or if the State courts arbitrarily refuse to pass on the Federal questions raised, and thus prevent recourse to a writ of error

6. Is a statute of the State of California in violation of the Fourteenth Amendment of the Constitution of the United States if it arbitrarily, in fixing the penalty, discriminates against false proofs by oral testimony and in favor of false proofs by documentary evidence, making the former punishable by imprisonment of from one to fourteen years in the State prison and the latter punishable by imprisonment of from one to five years? Is such classification arbitrary, and does it violate that provision of the Fourteenth Amendment inhibiting the denial of the equal protection of the laws of the State? If it does, can relief be had by *habeas corpus* from the United States District Court when all remedies have been exhausted, without avail in the State courts, or where the State courts arbitrarily refuse to pass on the Federal questions raised, and thus prevent recourse to a writ of error?

7. If a perjury is committed in a case of international extradition, is the offense a crime against the United States exclusively, and, if it is, can relief be had by *habeas corpus* from the United States District Court where the State has prosecuted and imprisoned for the offense, and must the remedy be first sought in the State courts?

8. If the State *subsequently* to a conviction of crime in a court or tribunal having no legal existence as a court of competent judicature and no jurisdiction over the person or subject-matter makes or adopts a law vesting a similar court or tribunal with the requisite authority and jurisdiction in like cases, is the law *ex post facto*, therefore in violation of section 10 of article 1 of the Constitution of the United States, where construed by the courts of the State as applicable to such previous conviction and the resulting sentence? Can relief be had by *habeas corpus* on application to the United States District Court in a case where all remedies have been exhausted in the State courts and with-

out avail, or where the state courts have refused to pass upon the Federal questions raised, thus preventing recourse to a writ of error? Is the imprisonment also a deprivation of liberty without *due process of law,* therefore in violation of the Fourteenth Amendment?

9. Can the courts of a State legally acquire jurisdiction over the person of the accused in a case dependent on an extradition prohibited by the treaty? Can a valid jurisdiction be acquired by means of an extradition in fraud of the treaty? If not, can the accused be legally imprisoned on a *derivative* charge, resting for its validity upon the pre-existence of lawful jurisdiction in the extradition case, over the person of the accused? Is the proper remedy by *habeas corpus* from the United States District Court, in the first instance, without need of recourse to the State courts for redress?

10. Assuming that a person can be lawfully prosecuted and convicted of an offense *different* from the one upon which the extradition was granted, where it is a subsequent offense, is it lawful for the State court to acquire the requisite jurisdiction over his person while he is held by the United States *in custodia legis* for the purpose of enforcing the treaty and the law of the extradition by giving him or securing him a trial to a final conclusion on the specific charge in respect to which his extradition was granted by the foreign nation; and is the authority or jurisdiction of the United States in cases of international extradition exclusive of the several States? Is the remedy that of *habeas corpus* from the United States District Court, in the first instance, without the need of previous application to the State courts for redress?

11. Is an imprisonment that is made *illegal* by either the law of the State or the Constitution of the United States an unlawful interference with or obstruction to the *treaty right* of returning to the country granting the extradition where

the extradition case has been previously disposed of by dismissal on motion of the prosecution? Can relief be had by *habeas corpus* from the United States District Court, in the first instance, without need of recourse to the State courts for redress?

12. Imprisonment in the State prison being necessarily involuntary servitude (*Ex parte Arras,* 78 Cal., 304), is it in violation of the Thirteenth Amendment of the Constitution of the United States if the appellant has not been "duly convicted of crime" in the jurisdictional sense of the phrase; and, if it is, can relief be had by *habeas corpus* from the United States District Court, in the first instance, without need of recourse to the State courts for redress; and, if not, can the Federal jurisdiction be rightfully invoked where all State remedies have been previously exhausted and the State courts arbitrarily refuse to pass on the Federal questions raised, thus preventing a writ of error being issued in the case?

All these questions are to be determined on this appeal upon the facts averred in the complaint or petition for *habeas corpus* appearing in the record. On the decision of the legal or Federal questions thus presented depends the proposition of affirmance or reversal of the judgment appealed from and the liberation or continued imprisonment of the appellant.

VI.

Specification of Errors.

The appellant respectfully specifies the following errors in the ruling, decision, and judgment of the United States District Court, Northern District of California, in denying his petition and application for the writ of *habeas corpus,* and dismissing the suit, to wit:

1. That the court erred in denying the petition of the appellant for the writ of *habeas corpus* and in refusing to grant his application for the writ. Also in dismissing the suit.

2. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the treaty of extradition between the United States and Great Britain.

3. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the extradition jurisdiction over his person, as held by the United States *in custodia legis*, pursuant to the treaty of extradition, and in enforcement of its provisions.

4. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the law of the extradition.

5. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of international law.

6. That the court erred in ruling and deciding that the extradition jurisdiction as held by the United States over the person of the appellant *in custodia legis* in enforcement of the treaty, is not supreme and exclusive.

7. That the court erred in ruling and deciding that it was competent and legal for the State of California to intercept and supersede the extradition process and the extradition jurisdiction over the person of the appellant as held by the United States *in custodia legis*, pursuant to the treaty, and thereupon try the appellant, convict, and imprison him on a charge different from the one upon which he was extradited, and do this while the extradition case was pending and awaiting trial to a final conclusion.

8. That the court erred in ruling and deciding that it was competent and legal for the State of California to substitute for the extradition charge of perjury a *derivative* charge of perjury, and thereupon try the appellant, convict, and imprison him on the derivative accusation, to the complete exclusion and extinction of the extradition jurisdiction,

and of the rights conferred upon him by the law of the extradition, especially in a case where his acquittal on the extradition charge would have sustained and maintained those rights and barred the prosecution on the subsequent and derivative accusation.

9. That the court erred in ruling and deciding that an extradition obtained for a purpose prohibited by the treaty, to wit: that the accused might answer civil liabilities, is sufficient in law to make valid and adequate the jurisdiction to try the appellant on a derivative criminal charge and imprison him in respect thereto.

10. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of section 5275 of the Revised Statutes of the United States.

11. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the Thirteenth Amendment of the Constitution of the United States, in the particulars set forth in the complaint or petition for the writ of *habeas corpus*, appearing in the record on this appeal.

12. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the Fourteenth Amendment of the Constitution of the United States, in the particulars set forth in the complaint or petition for the writ of *habeas corpus*, appearing in the record on this appeal.

13. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of section 10 of article 1 of the Constitution of the United States, in the particulars set forth in the complaint or petition for the writ of *habeas corpus*, appearing in the record on this appeal.

14. That the court erred in ruling and deciding that the Fourteenth Amendment of the Constitution of the United States, in requiring *due process of law*, does not prohibit the arbitrary denial by the State of California, of a perfectly valid and legally sufficient defense to a criminal charge, where the rejected defense goes to the merits and is one that in law establishes the legal innocence of the accused on the charge made against him, and necessitates his acquittal.

15. That the court erred in ruling and deciding that the Fourteenth Amendment of the Constitution of the United States, in requiring *due process of law,* does not prohibit a state from imprisoning a person upon a judgment of a court or tribunal that is not a legally-constituted court or tribunal, nor a legal or valid court of judicature of the State, previously established by law, and vested with competent jurisdiction over both the person and subject-matter.

16. That the court erred in ruling and deciding that a grossly excessive sentence and a grossly excessive imprisonment in the State prison, pursuant thereto, especially when prohibited by section 6 of article 1 of the Constitution of the State of California, as being a cruel and unusual punishment, is not in violation of the Thirteenth Amendment of the Constitution of the United States.

17. That the court erred in ruling and deciding that a grossly excessive sentence and a grossly excessive imprisonment in the State prison, especially when prohibited by section 6 of article 1 of the Constitution of the State of California, as being a cruel and unusual punishment, therefore an excess of jurisdiction, is not in violation of the Fourteenth Amendment of the Constitution of the United States, because both a deprivation of liberty without *due process of law* and a denial of the equal protection of the law, on the facts pleaded in the complaint or petition for *habeas corpus,* appearing in the record on this appeal.

18. That the court erred in ruling and deciding that the imprisonment is not in violation of the Eighth Amendment of the Constitution of the United States, in the particulars stated in the complaint or petition for *habeas corpus,* appearing in the record on this appeal.

19. That the court erred in ruling and deciding that section 126 of the Penal Code of California is not in violation of the Fourteenth Amendment of the Constitution of the United States, in the particulars set forth in the complaint or petition for *habeas corpus* appearing in the record on this appeal.

20. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of his *treaty right* to return to the country from which he was extradited.

21. That the court erred in ruling and deciding that the appellant is not imprisoned in violation of the provisions of section 2 of article 4 of the Constitution of the United States, nor of that portion of the Fourteenth Amendment prohibiting the abridgment of the privileges or immunities of citizens of the United States.

22. That the court erred in ruling and deciding that jurisdiction over a charge of perjury alleged to have been committed in an international extradition case, is not exclusively in the district court of the United States because an offense against the sovereignty of the United States, as a result of its exclusive authority over the subject of international jurisdiction, and no different in principle from its exclusive jurisdiction over charges of perjury in cases of naturalization in State courts.

Holmgren vs. United States, 217 U. S., 509.

VII.

Brief of Argument.

THE FEDERAL JURISDICTION. THE NECESSITY FOR ITS EXERCISE IN THIS CASE.

The preliminary questions of jurisdiction and remedy are quite easily disposed of in favor of the appellant. By section 238 of the Judicial Code, an appeal may be taken from the district court direct to the Supreme Court of the United States

> "in any case that involves the construction or ap-
> "plication of the Constitution of the United States;
> "in any case in which the construction of any treaty

"made under its authority is drawn in question; and
"in any case in which the constitution or law of a
"State is claimed to be in contravention of the Con-
"stitution of the United States."

The requisite certificate of probable cause for the allowance of the appeal was granted by the United States district court (act of March 10, 1908, U. S. Stat. at Large, vol. 35, p. 40), and appears in the record. In the decision of the Federal questions presented, the Supreme Court of the United States will exercise an independent judgment in the determination of what constitutes the law of the State.

Yick Wo vs. Hopkins, 118 U. S., 356, 366.
Scott vs. McNeal, 154 U. S., 34, 45.
Brannon on Fourteenth Amendment, 398.

If it was in law, the imperative province of the United States district court to grant *habeas corpus* in the first instance, on any one of the Federal questions raised, and irrespective of previous recourse to the State courts for relief, then upon appeal, the Supreme Court of the United States will determine *all* of the Federal questions presented, including the questions required to be first submitted to the State courts, whether they were so submitted or not, and this upon the very elementary principle that jurisdiction extends over the entire case, and all questions involved; therefore where a court, in the proper exercise of its jurisdiction, is required to determine on its merits, any one of the questions involved, it will take cognizance of and decide all the other justiciable questions presented, and this, to the end that the decision may respond to the entire case. In no other way can justice be done. However, it is self-evident that if the imprisonment is illegal, whether because in violation of the Constitution of the United States or laws of the State, it is necessarily an unlawful interference with and obstruction to the due and proper exercise of the *treaty right* to return to the country granting the appellant's ex-

tradition, the extradition case having been dismissed on motion of the prosecution. In all such cases, it is incumbent on the United States district court to grant relief by *habeas corpus* in the first instance, and the aggrieved party cannot be remitted to his remedy in the State courts, for redress. This is well-settled law in cases of international extradition pursuant to treaty.

RIGHT TO HABEAS CORPUS.

From United States District Court.

In respect to the legal right of relief by *habeas corpus*, exclusive of any remedy in the State courts, it is held that the duty devolves on the United States district court to issue the writ in the first instance, where the imprisonment is in violation of *treaty right.*

In re Rauscher, 119 U. S., 407;
Cohn vs. Jones, 100 Fed. Rep., 639;
Mali vs. Hudson, 120 U. S., 1;
Spear on Extradition, 233, 234.

This is held to be a well-settled exception to the general rule requiring that relief be first sought in the State courts and then by writ of error from the United States Supreme Court.

And where the State remedies have been fully exhausted there is a legal right to *habeas corpus* from the United States district court on all questions of constitutional law.

Minnesota vs. Brundage, 180 U. S., 499, 505.
Ex parte Medley, 134 U. S., 160.

All State remedies were fully exhausted in appellant's case.

So, too, where the highest court of the State "in which a decision in the suit could be had" arbitrarily refuses to decide or pass upon the Federal questions raised, there can

be no Federal writ of error (*Judicial Code,* section 237); nor will mandamus lie from the United States courts to compel a decision. In such cases, the only remedy against the imprisonment, is *habeas corpus* from the United States district court.

Aside from this, and passing to another point, a petition for *habeas corpus* is an independent civil suit, to establish the civil right of liberty (*Ex parte Tom Tong,* 108 U. S., 559), against a specific illegal imprisonment; it is therefore of no importance whether the questions raised were or were not presented on a preceding appeal in the criminal case wherein the judgment was rendered. *The specific remedy for illegal imprisonment is the writ of habeas corpus, and not appeal.* Refusal of relief on application for the writ, is held not to be *res adjudicata* (Church on *Habeas Corpus,* sec. 386). Nor will a decision on the validity of an imprisonment, or on questions presented, preclude the issuance of the writ where a different imprisonment is involved.

Says Cooley:

> "Even parties and privies are bound only so far
> "as regards the subject-matter then involved, and
> "would be at liberty to raise the same questions
> "anew in a distinct controversy affecting some dis-
> "tinct subject-matter."
>
> Cooley's Const. Lim. (7th ed.), 82.

Nor can the doctrine of *stare decisis* prevent a re-examination of questions erroneously decided in a case of personal liberty. It is said by Sutherland:

> "There are questions where the decision did not
> "constitute a business rule, and where a change
> "would invalidate no business transactions con-
> "ducted upon the faith of the first adjudication. As
> "an illustration, take a case involving personal
> "liberty; a party restrained of his liberty claims
> "to be discharged under some constitutional pro-
> "vision; the court erroneously decides against him;
> "the same question arises again. To change such

"a decision would destroy no right acquired in the "past; it would only give better protection in the "future. The maxim in such a case," (*stare de-"cisis* and law of the case), "would be entitled to "but very little weight, and mere regard for sta-"bility ought not to be allowed to prevent a more "perfect administration of justice."

2 Sutherland Stat. Constr., p. 903.

See also:

1 Willoughby Const. Law, p. 52.

Hart vs. Burnett, 15 Cal., 530.

Nor will a prisoner be precluded from presenting on petition for *habeas corpus*, questions of jurisdiction that might have been but were not raised or decided upon a preceding appeal or on a prior application for *habeas corpus*. Say the Supreme Court of California:

"Certain it is that it cannot be construed as a "final and conclusive adjudication, or any adjudica-"tion at all, upon propositions not presented to and "passed upon by the court, for, even in the same "case, an appellate tribunal is bound by its prior "decision only upon points distinctly made and de-"termined, and not at all upon points which might "have been raised but were not."

In re Central Irrigation District, 117 Cal., 388; citing—

Balch vs. Hines, 73 Fed., 974;

Cross vs. Burke, 146 U. S., 82;

Union School vs. Crawfordsville Bank, 102 Ind., 464;

Haynes vs. Trenton, 123 Mo., 326.

Say the Supreme Court of the United States:

"Previous adjudications on other points do not "operate as an estoppel against the parties in new "cases, nor conclude the court upon the constitu-"tionality of the acts, because that point might have "been raised and determined in the first instance."

Boyd vs. Alabama, 94 U. S., 645, 648.

It will be found that these various propositions are more or less pertinent to the decision on the former appeal in relation to a different imprisonment. We refer to the appeal and writ of error in *Collins vs. O'Neil,* 214 U. S., 113. The two perjury indictments are set forth at length in the record on that appeal (see record No. 241, October term, 1908, pp. 16, 18); the substance of them is stated in the record on this appeal. The court on this appeal will take judicial notice of the contents of the record on the former appeal, including the indictments.

It is the well-settled rule that *habeas corpus* is the proper remedy where the imprisonment is in violation of a constitutional right or a treaty right, or the judgment under which the imprisonment is maintained, is the result of a denial of constitutional or treaty right, or the culmination of proceedings where such a right was set up and erroneously rejected.

In re Snow, 120 U. S., 274;
In re Nielsen, 131 U. S., 176, 182, 184;
Cohn vs. Jones, 100 Fed. Rep., 639;
Mali vs. Hudson, 120 U. S., 1;
Ex Parte Medley, 134 U. S., 160.

Some of the questions presented on the present appeal, though raised, but not decided, on application to the Supreme Court of the State, for *habeas corpus,* could not have been raised or litigated on the appeal from the judgment of conviction, as they are to an extent dependent on subsequent events; the same is true in respect to the case on the former appeal in *Collins vs. O'Neil,* 214 U. S., 113. So far as the decision there is of any importance on the present appeal, we shall show, and of course with due deference, that it is not sustainable on principle or authority; that it proceeds primarily on a complete misunderstanding of appellant's contention and in fact does not correctly state the point raised. To the

utmost extent possible, the Federal questions we now present, were raised in the trial court and overruled; were again raised on appeal and subsequently on petition for *habeas corpus* to the State courts, but in every instance without avail.

VIII.

Argument on Merits.

Rejection of Valid Defense.

Violation of Fourteenth Amendment.

The first point we urge and with much emphasis is, that the arbitrary denial or rejection by the State courts of a perfectly valid and legally sufficient defense to a criminal accusation;—a defense going to the merits, and in law conclusively establishing that the accused is legally innocent of the crime charged therefore necessitating his acquittal, is a deprivation of the *due process of law* guaranteed him by the Fourteenth Amendment of the Constitution of the United States. On this point the authorities concur in fully sustaining appellant's contention.

See:

People vs. Supervisors, 70 N. Y., 228, 234;
Pennoyer vs. Neff, 95 U. S., 714;
Hovey vs. Elliott, 167 U. S., 409, 446;
Mobile R. R. Co. vs. Turnipseed, 219 U. S., 35, 43;
Windsor vs. McVeigh, 93 U. S., 274;
Wright vs. Cradlebaugh, 3 Nev., 341, 349;
McClatchy vs. Superior Court, 119 Cal., 413, 416, 418, 420;
Younger vs. Superior Court, 136 Cal., 687;
McGehee on Due Process of Law, 1, 85;
Brannon on Fourteenth Amendment, 251.

Nothing could be more ridiculous than to say to a defendant in a criminal case:

> "We give you notice of the accusation and in order
> " that you may have an opportunity to be heard in
> " your own defense, as an essential requirement of
> " 'due process of law,' guaranteed you by the Con-
> " stitution of the United States, but we exclude you
> " from making a valid and legally conclusive de-
> " fense, if you have one."

In judicial proceedings "due process of law" means notice and the opportunity to be heard in answer to the claim or charge asserted, and therein to interpose, maintain, and establish by adequate proofs a legally competent and valid defense. Notice has for its purpose the opportuniity to be heard, and therefore necessarily the opportunity to interpose and maintain by sufficient proofs a valid defense to the accusation or claim. This is self-evident. Say the New York Court of Appeals:

> "Due process of law requires that a party shall be
> " properly brought into court, and that he shall have
> " an opportunity when there, to prove any fact which,
> " according to the Constitution and the usages of the
> " common law, would be a protection to him or his
> " property."
>
> *People vs. Supervisors*, 70 N. Y., 228, 234.

And this principle of constitutional law, fundamental and indispensable in the administration of juridical justice, is pointedly affirmed by the Supreme Court of the United States. The court say:

> "The words, 'due process of law,' mean a course
> " of legal proceedings according to those rules and
> " principles which have been established in our sys-
> " tem of jurisprudence for the protection and en-
> " forcement of private rights."
>
> *Pennoyer vs. Neff*, 95 U. S., 714, 733.

And again, in a subsequent case:

> "There is no distinction in principle between de-
> "termining a cause upon issues not raised by the
> "pleadings, in the actual absence of the party, and
> "rendering a decree by refusing to permit a defend-
> "ant to be heard in his defense, *or to consider the*
> "*merits of a sufficient defense,* [italics ours], and,
> "indeed, by striking the pleading containing such
> "defense, from the files."
>
> *Hovey vs. Elliott,* 167 U. S., 409, 446.

Of what possible value is the fundamental right to life, or liberty, or property, if it cannot be defended against illegal deprivation? And what is illegal deprivation but that which the law prohibits? According to all the authorities on the point, the law prohibits the deprivation of liberty, on a charge or conviction of perjury, for testimony given in the trial of the extradition case, where the assailed testimony pertains only to what the statute expressly declares void *ab initio.* Therefore, a denial of this legally conclusive defense, or its arbitrary rejection, is clearly a violation of the constitutional right to the due process of law guaranteed by the Fourteenth Amendment. It is a denial of the right, the fundamental right of an accused person, to establish his innocence of the crime charged against him.

In criminal prosecutions "due process of law," as guaranteed by the Fourteenth Amendment of the Constitution of the United States, secures to the accused the right to interpose and maintain by sufficient proofs a valid and legally competent defense to the accusation, especially a defense going to the merits, and establishing in law his innocence of the charge made against him; therefore necessitating his acquittal.

The Rejected Defense.

In accusations of perjury it is a well-established principle of the common law that false testimony relating only to what is declared *void* by statute, in any event, cannot be made the legal or competent basis of a charge of perjury; that false testimony or truthful testimony, thus relating to a *nullity*, or a thing non-existent in contemplation of law—a mere legal non-entity—is itself a nullity. False testimony to a manifest nullity is no perjury. It is considered in law an extra-judicial oath. It can prejudice no one and that is the test. The following authorities are directly in point:

2 Whart. Crim. Law, sec. 1282, 10th ed.; secs. 1520, 1541, 1546, 11th ed.;
Crump vs. Com., 75 Va., 922, 923;
People vs. McDermott, 8 Cal., 288, 290;
People vs. Jones, 123 Cal., 299;
People vs. Collier, 48 Am. Dec., 699;
3 Coke's Institutes, 167.

Says Wharton:

"When the false oath is made to a matter which "is an absolute nullity, it is no perjury. Hence in "jurisdictions in which the statute of frauds renders "void certain contracts not in writing, a denial on "oath of the making of the contract is not perjury, "for the denial touches a non-existent object. * * * "A similar distinction in forgery has been noticed; "it is not indictable to forge an absolutely void in-"strument, though it is otherwise as to an instru-"ment only voidable. In other words, a fabrication "aimed into blank air, where there is no possibility "of injury, is not indictable."

2 Whart. Crim. Law, 10th ed., sec. 1282; sec. 1546, 11th ed.;
People vs. Tomlinson, 35 Cal., 503;
People vs. Cole, 130 Cal., 13, 15.

Such testimony cannot possibly be material, relating as it does to a void or legally non-existent thing, a mere non-entity. The oath is deemed in law to be *extrajudicial;* therefore no perjury.

Says Lord Coke:

> "For if it be not material, then though it be false, "yet it is no perjury, because it concerneth not the "point in suit, and therefore in effect, it is extra-"judicial."
>
> *3 Coke's Institutes,* 167;
> *People vs. Collier,* 48 Am. Dec., 699.

In the extradition case "the point in suit" was the basic averment in the indictment that there existed a *legal and valid marriage* with the prosecutrix. Manifestly, testimony that the prosecutrix was not a party to an undisputed *void marriage ceremony* could not by any possibility be relevant or material to the case thus presented by the indictment. It would be an extrajudicial oath and prejudice no one; therefore, no perjury if false, because impossible of injury or detriment to public or private interests.

> "The rule is well established that the false oath "must be material to the issue, and, therefore, preju-"dicial to some one, otherwise, however willful, it "cannot be perjury."
>
> *People vs. McDermott,* 8 Cal., 288, 290;
> *People vs. Jones,* 123 Cal., 299, 302.

This is the law of California because it is the common law; the common law has been adopted as the rule of decision in that State. Section 4468 of the Political Code of California is as follows:

> "The common law of England, so far as it is not "repugnant to or inconsistent with the Constitution "of the United States, or the laws of this State, is "the rule of decision in all the courts of this State."

Section 118 of the Penal Code of California, defining perjury, is declaratory of the common law. It is as follows:

> "Every person who, having taken an oath that he "will testify, declare, or certify truly before any com- "petent tribunal, officer, or person, in any of the "cases in which such an oath may by law be admin- "istered, willfully and contrary to such oath, states "as true, any material matter which he knows to be "false, is guilty of perjury."

To the same effect is Hawkins.

Hawkins' Pleas of Crown, 429.

Likewise Coke and Blackstone.

3 Coke's Institutes, 164;

4 Blackst. Com., 137.

In California only those acts or omissions are crimes that are defined to be such by statute. A false oath not amounting to perjury is not a crime in that State, though it is in other States and at common law.

2 Bishop, New Crim. Law, sec. 1014.

Taking the case presented by the record on this appeal, it is impossible to perceive any relevancy to the extradition indictment of testimony simply showing that the prosecutrix was not a party to a *void marriage ceremony.* Of course, whether the ceremony was void or not as a marriage would be a different question; but a question not presented by the charge, nor by the assignment of perjury in either the first or second perjury indictment; nor could it be made the subject of a perjury charge unless the testimony as to the pre-existing common-law marriage was assigned as perjury. *In the extradition case it could make no difference whether the prosecutrix was or was not a party to the ceremony the statute declared void as a marriage, even should we assume she were in fact a party to it;* but it would

make quite a difference whether the ceremony with her were *void* as a marriage, by section 61 of the Civil Code, because of the pre-existing common-law marriage to another; for that would go to the issue whether there was a valid and legal marriage with the prosecutrix, which was the very question presented by the extradition indictment; therefore, if the testimony given in the trial of the extradition case establishing the pre-existing common law marriage were false, it would constitute a good and sufficient basis for a valid charge of perjury; but not testimony that the prosecutrix was, nor that she was not, a party to *a void marriage ceremony,* one made *void ab initio* by section 61 of the Civil Code; it would be otherwise if the testimony were that she was not a party to a valid and legal marriage ceremony. In that event, if the testimony were false, it would be perjury in the extradition case; but that is not the charge in the second perjury indictment, as shown quite fully in the first part of this brief. Taking all the testimony together, as given by the defendant upon the point, in the trial of the extradition case, it simply amounts to this: *That the prosecutrix was not a party to a void marriage ceremony.* Now, if, in fact, she were a party to a void marriage ceremony, the result in law and in fact would be the same. In either case it could not have any possible relevancy in the extradition case, and this for the manifest reason that the case there and the indictment in the case are altogether exclusively predicated upon a valid and legal marriage with the prosecutrix—not a void one. The fact that the defendant testified the prosecutrix was not a party to the ceremony of May 15, 1889, would not in any degree tend to show whether it was a legal or a void marriage or a legal or void marriage ceremony with her; on the contrary, it was his testimony given in the trial of the extradition case, establishing the pre-existing common-law marriage, that made absolutely *void* under the statute, to wit, section 61 of the Civil Code, the marriage and marriage ceremony

with the prosecutrix, did it occur as claimed by the prosecution and as averred in the second perjury indictment; therefore the only possible legal assignment of perjury on the subject of marriage, in respect to the testimony given by the defendant in the extradition case, is the one restricted to that specific portion of his testimony establishing the pre-existing common-law marriage, if that testimony were false. Of course, if the testimony were true, as shown in the record on this appeal, and stands undisputed by the prosecution, then the extradition charge was conclusively refuted and defeated; there was no perjury, even though it were also true that the prosecutrix was in fact a party to the *void marriage ceremony of May 15, 1889,* and the defendant's testimony to the contrary were false. In fact, it would be simply because she were a party to the ceremony that it thereby became null and void by section 61 of the Civil Code; therefore, legally non-existent. The legal effect would be precisely the same as if she had not been a party to the nonentity. Whether she were or were not a party to a *valid* marriage ceremony, could be made the competent basis of a legal assignment or perjury, on testimony in the extradition case, if any such testimony were false; *but not whether she were a party to a void marriage ceremony;* that would only be a good assignment of perjury in cases of bigamy or a suit to annul the marriage because void, and similar cases where the fact that the marriage is void is itself an essential element in the cause of action, civil or criminal; not where the cause of action is predicated entirely upon the existence of a perfectly legal and valid marriage, as in the extradition case. The preceding common-law marriage in November, 1888, with Agnes Newman (see Record, pp. 4, 7) is itself the determinative and dominant fact in the litigation, operating to render absolutely null and void the marriage ceremony of May 15, 1889, were the latter with the prosecutrix, as averred in the second perjury indictment. This determinative fact has never been controverted or questioned by the

prosecution, nor made the subject of a perjury charge, nor of an assignment of perjury. It must, therefore, be taken as the decisive fact in the case, establishing the point that the defendant did not commit perjury in testifying that the prosecutrix was not a party to the void marriage ceremony of May 15, 1889, declared void by section 61 of the Civil Code, because of the pre-existing and perfectly valid common-law marriage between the accused and another person. It could make no difference whatever in the extradition case, whether the prosecutrix were or were not a party to the *void marriage ceremony* of May 15, 1889; and, therefore, false testimony one way or the other upon the point as to whether she were or were not a party to what the statute makes null and void *ab initio*, could not legally constitute the valid and competent basis of a charge of perjury committed in the trial of the extradition case. We are simply endeavoring to present our contention from every possible angle, even at the risk of some repetition. What we have urged in this brief respecting the general nature of the case, strongly reinforces the proposition that in the arbitrary rejection of a perfectly valid and legally conclusive defense to the second perjury indictment, the State courts deprived the appellant of the *due process of law* and the equal protection of the law guaranteed him by the Fourteenth Amendment. Of course, the Supreme Court of the United States will take judicial notice that the proposition of law involved in the rejected defense is and always has been the law of the State of California and pertinent to the case. This is a self-evident proposition at the basis of the point we urge, even though the second indictment does not aver that the marriage ceremony of May 15, 1889, constituted a legal or any marriage between the defendant and the prosecutrix; on the other hand, *a multi fortiori*, if it did so aver;—the rejected defense, if sustained by adequate proofs, would have still been legally conclusive against the second perjury charge.

The conclusion is, and must be, that in rejecting the de-

fense interposed by the appellant, and in rejecting the proofs establishing the facts fully sustaining the proffered defense, and that, too, for a reason in law requiring that the defense and supporting proofs be received and sustained, the State courts arbitrarily deprived him of the *due process of law* guaranteed him by the Fourteenth Amendment of the Constitution of the United States. The rejected defense went to the merits and necessitated the acquittal of appellant upon the ground that he is legally innocent of the perjury charged in the second indictment, to wit: the one of December 29, 1905, on which he stands convicted, and is now imprisoned in execution of an atrocious sentence of Draconian barbarity, in a case where there was no possibility of injury to public or private interests, and no possibility of damage or detriment to the rights of any one; and where no judgment, order, decree, or verdict was induced, influenced, or procured by means of the assailed testimony, and where any such result was simply impossible.

The State appellate courts, in the condition of the record before them, with its exclusion of the interposed defense and the rejection of the proofs establishing that the ceremony of May 15, 1889, were it with the prosecutrix, was null and void *ab initio*, by section 61 of the Civil Code, held, and were thus enabled to hold, that the assailed testimony was material; this on the hypothesis of a valid and legal marriage, for only in that event would the testimony, if false, be perjury. It is self-evident that false testimony in the extradition case as to the identity of the parties participant in a *valid or legal marriage*, would be perjury; but not where the marriage was *void ab initio* by statute. It would be different if perjury were assigned on false testimony, showing the marriage void; but there is no such charge made against appellant, and it could only be made by assigning perjury on his testimony in the extradition case, relative to the prior and pre-existing common-law marriage with Agnes Newman.

The State appellate courts made no reference whatever to

the point urged before them, as to the arbitrary exclusion of the interposed defense and the arbitrary rejection of the proofs tendered to support and establish the defense; nor did they in any manner allude to the Federal questions raised in respect to the arbitrary deprivation of the defense by the ruling of the trial court in sustaining the objection to it, upon a ground that in law required it be received and sustained, and the defendant acquitted because legally innocent of the crime charged against him.

The State appellate courts simply ignored and evaded the question altogether and made no attempt to decide it. They did not, however, go to the extreme of deciding that the ceremony of May 15, 1889, was not *void* as a marriage, under section 61 of the Civil Code of California, nor that false testimony in the extradition case concerning the identity of the parties to a void marriage ceremony, one expressly declared void by statute, would be perjury. This is very important to bear in mind. Nor was the slightest reference made in the decision on the appeal from the conviction, to section 61 of the Civil Code; therefore the appellate ruling must be considered a nullity.

Alferitz vs. Borgwardt, 126 Cal., 201.

It was manifestly a failure on the part of the court to note the statute, as in the case just cited. Nor did the State appellate courts make any reference to the common-law principle stated in *2 Wharton's Crim. Law*, sec. 1282, 10th edition, though strongly urged upon the court's attention.

In short, they did not pass upon the point at all, nor on the Federal question raised in relation to it, but contrived to manœuver around and away from it and to avoid, ignore, and evade the matter altogether. They simply considered the void ceremonial of May 15, 1889, as being material for the purpose of ascertaining the parties to it, irrespective of whether it was void or not, but on the assumption that it was valid, for the court speaks of a ceremony

as the usual method of entering into a marriage, and this, of course, can only be true of a valid and not a void marriage ceremony. Say the appellate courts:

> "The materiality of such testimony could not be "affected by the fact that such ceremony did not "effectuate a marriage between defendant and "Agnes" (she was the party to the preceding and perfectly valid common-law marriage. *Sharon vs. Sharon*, 75 Cal., 9; *Kilburn vs. Kilburn*, 89 Cal., 50; *Sharon vs. Sharon*, 79 Cal., 670; *People vs. Beevers*, 99 Cal., 286); "if his testimony that the ceremony "was performed between himself and Agnes was "true, there was no ceremony or marriage between "himself and Charlotta, whether or not there had "ever been any prior marriage to Agnes."
>
> *People vs. Collins*, 92 Pac. Rep., 513, 518, 519.

This clearly shows not only that the State appellate courts did not decide the point, but that they utterly failed to note section 61 of the Civil Code; therefore the ruling is a nullity and must be so regarded.

Alferitz vs. Borgwardt, 126 Cal., 201.

Under section 61 of the Civil Code, any marriage or marriage ceremony with Charlotta, the prosecutrix, on May 15, 1889, would be absolutely null and void, because of the pre-existing perfectly valid and undisputed common-law marriage with Agnes. This is the dominant and determinative point the State appellate courts simply ignored and evaded by the method of a flagrant *petitio principii*, in postulating the decision on the gratuitous assumption that the ceremony would be valid and not void as a marriage with the prosecutrix. The court quite inexplicably misstated appellant's contention by very wrongfully ascribing to him the rather queer proposition that the ceremony of May 15, 1889, was not a legal marriage with *Agnes*, because of the pre-existing common-law marriage with her, and that conse-

quently testimony that Charlotta, the prosecutrix, was not a party to the ceremony was not material. The appellant certainly never made any such a ridiculous and involved contention. His point was that the ceremony, had it been with the prosecutrix, as alleged in the indictment, was *void* as a marriage, and so declared by section 61 of the Civil Code; that, therefore, false testimony, if any, to the effect that she was not a party to the void ceremony would not be perjury in the extradition case, where the basic averment in the indictment was that of valid and legal marriage with her. The State appellate courts made no attempt whatever to pass on this point, but, on the contrary, predicated their decision on the self-appropriated assumption that the ceremony of May 15, 1889, if with the prosecutrix, would be a valid and legal marriage; they did not go to the extreme of directly so deciding, but they very gratuitously assumed the hypothesis and based their decision upon it. This they contrived to do by altogether ignoring and evading the Federal question raised by the appellant, and by failing to note the provisions of section 61 of the Civil Code, and the point that appellant had been arbitrarily deprived of a perfectly valid and legally conclusive defense to the second perjury indictment, a defense going to the merits and establishing that he is legally innocent of the crime charged against him. They altogether ignored and evaded the point that the question was not as to whether the prosecutrix was a party to an undisputed valid marriage ceremony, but whether she was a party to an undisputed *void* marriage ceremony. If the former, there would be perjury; if the latter, perjury would not be possible. This was the defense presented and arbitrarily rejected by the trial court; this was the point, and also the Federal question raised on appeal, to wit, that the arbitrary rejection of the interposed defense was a violation of the Fourteenth Amendment of the Constitution of the United States in depriving appellant of due process of law and of the equal protection of the law. These are the points the State appellate courts sedulously avoided

and evaded in order that the conviction be affirmed. Comment is unnecessary. The thing speaks for itself, *res ipsa loquitur*. Of course, it really makes no difference what the State appellate courts actually and by artifice accomplished or did in attaining the ultimate decision; but it is enough to know that the direct result of the decision on the appeal is to confirm the action of the trial court in arbitrarily rejecting a perfectly valid and legally conclusive defense to the accusation. The decision on appeal could not possibly impart any validity to the judgment of conviction; both judgments would be void for the same reason.

Pioneer Land Co. vs. Maddux, 109 Cal., 633.

Assuming the ceremony of May 15, 1889, to have been with the prosecutrix, precisely as alleged in the second perjury indictment, it was the legal and constitutional right of the accused to interpose, maintain, and by adequate proofs establish the legally conclusive defense that the ceremony of May 15, 1889, was in that case absolutely *void ab initio* by section 61 of the Civil Code, and, being void, false testimony that the prosecutrix was not a party to it would not be perjury in the trial of the extradition charge, where only a legal and valid marriage with her would sustain the accusation there made.

2 Whart. Crim. Law, sec. 1282, 10th ed.; secs. 1520, 1541, 1546, 11th ed.

This is the law of California, as we have heretofore in this brief fully established.

As already repeatedly pointed out, false testimony tending to show or showing that the ceremony of May 15, 1889, with the prosecutrix, would be void as a marriage, because of the prior and pre-existing common-law marriage to another, is perjury in the extradition case; but not false testimony that she was not a party to what is in law and fact, a void marriage ceremony, and so declared by section sixty-one of the Civil Code.

Says Hawkins:

"Perjury by the common law seemeth to be a wil-
" ful false oath by one who being lawfully required
" to depose the truth in any proceeding in a course
" of justice, swears absolutely in a matter of some
" consequence to the point in question, whether he be
" believed or not."

1 Hawkins' Pleas Crown, 429.

Now the "point in question" in the extradition case, was not the identity of the parties to a *void marriage ceremony,* but on the contrary, the existence of and the identity of the parties to a valid and legal marriage. This alone constituted the basic averment of the extradition indictment. It is only in the event that the ceremony of May 15, 1889, constituted a legal marriage with the prosecutrix, that false testimony to the effect she was not a party to the ceremony would be perjury in the extradition case. In any event, whether the charge were perjury in giving false testimony tending to show or showing the marriage ceremony of May 15, 1889, to be void as a marriage with the prosecutrix, by section sixty-one of the Civil Code, or the charge were of perjury in giving false testimony that the prosecutrix was not a party to a valid marriage, or on the other hand, that she was not a party to a void marriage ceremony, it would be a perfect and legally conclusive defense to show that the marriage was void by statute, and therefore that false testimony concerning it was no perjury in the extradition case, where only a valid marriage would sustain the indictment, and the charge there made. It follows, that in arbitrarily rejecting the interposed defense, and the proffered proofs sustaining it, for reasons that in law required it be received and upheld, the State courts deprived the appellant of the *due process of law,* and the equal protection of the law, guaranteed him by the Fourteenth Amendment of the Constitution of the United States; therefore the imprisonment is illegal, and being illegal, is an unlawful obstruction to and invasion of the *treaty right* of return to the country granting the extradition of appellant, the extradition case having been

dismissed on motion of the prosecution. The remedy is *habeas corpus* from the United States District Court in the first instance, and without need of recourse to the State courts. The authorities heretofore cited on the point are clearly decisive in sustaining it.

On the trial of the extradition case, the Superior Court received the defense in question and instructed the jury that it entitled the defendant to an acquittal (Rec., p. 5); but, by some inscrutable perversity of judgment, the jury failed to agree and were discharged. On the trial of the second perjury indictment, the defense was again interposed, but before a different judge, and this time rejected, and on the ground that the prosecution did not contend that the ceremony of May 15, 1889, constituted a legal marriage with the prosecutrix. *In both cases the ceremony of May 15, 1889, was the basis of the perjury charge.* In the extradition case, the prosecution contended not only that the prosecutrix was a party to the ceremony, but that it constituted a legal marriage between her and the defendant; that therefore he committed perjury when, in his sworn answer to the complaint in the civil suit, he denied a *marriage* with her. In the trial of the second perjury charge, the prosecution abandoned the contention that the ceremony constituted a legal marriage between the prosecutrix and the defendant, but rested the case for the State entirely on the proposition that, while the ceremony did not constitute a legal marriage, and irrespective of whether it constituted a legal marriage or not, the prosecutrix was a party to it, and that it occurred between her and the defendant. Thereupon, the defendant, as in the extradition case, again interposed the defense that, conceding the ceremony of May 15, 1889, to have been with the prosecutrix, to have actually occurred between the prosecutrix and the defendant exactly as claimed by the State, that it was absolutely void *ab initio* by express declaration of section 61 of the Civil Code of California because of the perfectly valid and

pre-existing common-law marriage between the defendant and Agnes M. Newman; that, therefore, false testimony, if any, given by the defendant on the trial of the extradition case, that the prosecutrix was not a party to the void marriage ceremony of May 15, 1889, and that the void marriage ceremony did not occur between her and the defendant, could not in law constitute the crime of perjury *in the extradition case*, where only a legal marriage between the prosecutrix and the defendant as the result of the ceremony of May 15, 1889, would sustain the charge of perjury there made, to wit, an alleged perjury in denying by sworn answer in the civil suit that he ever *married* the prosecutrix, and that he did not marry her on the 15th day of May, 1889, nor at any other time or at all. This is the defense—the legally conclusive defense to the second perjury charge that the trial court *rejected*, together with the proffered proofs to sustain it, and did so, upon the sole ground that the question of marriage did not arise in the second perjury charge, forsooth the prosecution were not there contending, as they did in the trial and in the charge laid in the extradition case, that the ceremony of May 15, 1889, constituted a legal marriage between the prosecutrix and the defendant. This, of course, was nothing else but an arbitrary rejection of a perfectly valid and legally conclusive defense to the second perjury charge; therefore the arbitrary deprivation of the *due process of law* guaranteed the appellant by the Fourteenth Amendment of the Constitution of the United States. Clearly, if the rejected defense was a good and valid defense on the trial of the extradition case, as ruled by the State court, it was certainly for the same reason a good and valid defense to the second perjury charge, not only because it established the point that there was no legal marriage between the prosecutrix and the defendant, but that the ceremony of May 15, 1889, were it with the prosecutrix as contended by the State, and did it occur between her and the defendant, precisely as claimed by the

prosecution, it was absolutely null and void *ab initio* by express declaration of section 61 of the Civil Code of California by reason of the perfectly valid and pre-existing common-law marriage to Agnes M. Newman; that, consequently, there could be no perjury in false testimony in the extradition case that the prosecutrix was not a party to the void marriage ceremony of May 15, 1889, as it is and always has been the law in California that false testimony to an absolute nullity is no perjury—a proposition amply sustained on principle and precedent, as we have already fully established in this brief. The substitution of the second perjury charge for the extradition accusation was made for the very purpose of avoiding the necessity of establishing the basic fact of a legal marriage between the defendant and the prosecutrix—an essential element in the extradition charge, the State found impossible to sustain—hence the second perjury indictment, which entirely predicates the charge on a mere empty marriage ceremony, void as a marriage and not alleged in the indictment to constitute a marriage, but aside from this, both the charge in the extradition case and the charge in the substituted case depend absolutely on the same marriage ceremony, to wit, the ceremony of May 15, 1889, the difference being that in the extradition indictment, the State alleged and in the trial contended that the ceremony constituted a legal marriage between the defendant and the prosecutrix; but in the second perjury charge no such allegation was made in the indictment, nor was any such contention made in the trial of the case. This misled the trial court in ruling, as it did, in rejection of the interposed defense, but the rejected defense was primarily based on the very fact constituting the foundation of the second perjury charge, to wit, the absence of a legal marriage, and went to the point that the ceremony being void *ab initio* as a marriage, and so declared by statute, testimony given in the trial of the extradition case, that the prosecutrix was not a party to the void marriage ceremony,

could not, if false, constitute the competent or valid basis of a charge of perjury, especially as the extradition case rested for its basic fact upon the averment of a legal marriage between the defendant and the prosecutrix; so it is manifest that the rejected defense was legally conclusive as establishing the defendant's innocence on the second perjury charge.

In passing, and digressing for the moment, we wish to say that in some unaccountable way an error in citation has crept into the complaint, the case of People *vs.* McDermott, 8 Cal., 288, being cited as People *vs.* Burnett; but it is of no consequence, as the volume and page are correctly given. There are a few other, and entirely clerical, errors appearing in the complaint and in the petition for *habeas corpus* as printed in the transcript; they are absent from the original record and will be corrected in proper time, if necessary, on a *certiorari* pursuant to the fourteenth rule. We had no opportunity to examine the transcript of record furnished by the clerk of the District Court, else these errors would have been arrested at their inception. To resume:

IX.

Further Argument on Rejection of Valid Defense.

The rejection of the interposed defense, discussed in the last paragraph, was not only a deprivation of *due process of law*, but also a denial of the equal protection of the laws of the State, contrary to the Fourteenth Amendment. The appellant's plea of "not guilty," entitled him to interpose and maintain the defense. Upon that point, section ten hundred and twenty of the Penal Code of California is as follows, viz:

> "All matters of fact tending to establish a de-
> "fense, other than one specified in the third and
> "fourth subdivisions of section ten hundred and

"sixteen, may be given in evidence, under the plea "of not guilty."

Section ten hundred and sixteen of the Penal Code, is as follows:

"There are four kinds of pleas to an indictment or "information. A plea of: 1. Guilty. 2. Not Guilty. "3. A former judgment of conviction or acquittal "of the offense charged, which may be pleaded either "with or without the plea of not guilty. 4. Once "in jeopardy."

The act of the State courts in rejecting the interposed defense is the act of the State.

Ex Parte Virginia, 100 U. S., 339;
Scott vs. McNeal, 154 U. S., 34, 45;
Chicago, etc., vs. Chicago, 166 U. S., 226.

The State courts have no power or jurisdiction to arbitrarily reject a fundamental right.

Yick Wo vs. Hopkins, 118 U. S., 369, 370.

That they proceeded in the usual course of judicial action will make no difference. That is ordinarily done in every judicial denial of constitutional right; but does not sanctify or render invulnerable the wrong done.

"Any departure from those recognized and estab- "lished requirements of law, however close the ap- "parent adherence to form in method of procedure, "which has the effect to deprive one of a constitu- "tional right, is as much an excess of jurisdiction, "as where there is an inceptive lack of power."
Younger vs. Superior Court, 136 Cal., 682, 687.

A denial of a constitutional right is an excess of jurisdiction; the resulting judgment is a nullity.

Ex Parte Lange, 18 Wall., 163;
Windsor vs. McVeigh, 93 U. S., 274;
In re Snow, 120 U. S., 274;
In re Nielsen, 131 U. S., 176, 182, 184.

It is respectfully submitted that the complaint or petition for *habeas corpus* appearing in the record on this appeal makes out a *prima facie* case on the point relative to the violation of the Fourteenth Amendment of the Constitution of the United States, in the arbitrary rejection of a perfectly valid and legally conclusive defense to the second perjury indictment; a defense going to the merits, and in law establishing that the accused is innocent of the crime charged against him, necessitating his acquittal. We have heretofore in this brief fully shown that upon both principle and precedent *habeas corpus* from the United States District Court is the proper remedy for relief from the existing illegal imprisonment.

X.

The Trial Court a Nullity.

VIOLATION OF FOURTEENTH AMENDMENT.

The next point we insistently urge in support of the prayer for reversal is, that the "trial court" was not a court of competent judicature vested by law with requisite jurisdiction over the person and subject-matter; was not a legally constituted judicial tribunal or court of judicature of the State of California. That therefore in the trial, conviction and sentence pursuant to which the appellant is now imprisoned, he was deprived of the *due process of law,* and denied the equal protection of the law, guaranteed him by the Fourteenth Amendment of the Constitution of the United States. Trial and condemnation in a "court" having no competent jurisdiction over either the person or subject-matter, and no power or authority as a regularly constituted and pre-established judicial tribunal of the State, *is per se a deprivation of due process of law,* contrary to the Fourteenth Amendment.

Says a recent authority on constitutional law:

> "Due process of law requires the adjudicating court "to have jurisdiction both of the parties and of the "subject-matter. To give such proceedings any "validity, there must be a tribunal competent by "its constitution, that is, by the law of its creation, "to pass upon the subject-matter of the suit."
>
> *2 Willoughby on Constitution,* p. 858; see also to same effect:
> *McGehee on Due Process of Law,* pp. 58, 85;
> *Pennoyer vs. Neff,* 95 U. S., 714;
> *Scott vs. McNeal,* 154 U. S., 46.

As heretofore stated in this brief, the indictment upon the second or derivative perjury charge was found and filed in the Superior Court of the State of California in and for the city and county of San Francisco. The jurisdiction, as well the existence of that court, come from the constitution of the State. The judicial power of the Superior Court at San Francisco is vested in a court or tribunal of *twelve elected judges.* (*Carter vs. Lothian,* 133 Cal., 451, 454); we speak of the time of the trial, conviction and sentence of appellant. The twelve judges are required to be elected "by the qualified electors of the county," and a special provision is made in the State constitution for the exercise or administration of the court's jurisdiction, in a court held by any one or more of the *twelve elected judges,* but with no similar provision in reference to a "court" held by a judge from another county, until the *casus omissus* was supplied and remedied by an amendment to section 8 of article 6 of the State constitution, on November 8, 1910, more than four years after the trial, conviction and sentence of appellant. His trial and all the subsequent proceedings at *nisi prius* were had before a "court" presided over and held by the Hon. Albert G. Burnett, then and there a duly elected judge of the Superior Court of Sonoma County,—a court consisting of two judges only, and never an elected judge of the Superior Court of San Francisco County. No

judge of the latter court, though all the twelve judges thereof were fully competent, actually acting in the full performance of their official functions, and not disqualified, took any part in the trial, conviction or sentence of appellant, nor concurred in, or approved of the same; nor did the Superior Court of San Francisco County ratify or confirm the acts of Judge Burnett, were such a thing possible or permissible.

The question is, did the "court" held by Judge Burnett in the trial, conviction and sentence of appellant, have any legal *status* as a court of competent judicature of the State of California, and was it a pre-established and legally constituted judicial tribunal of the State, vested with requisite jurisdiction over the person and subject-matter? To determine this question, it is necessary that the provisions of the State constitution be carefully considered, as that is the source of the superior court's existence, jurisdiction and authority. Section 6 of article 6 of the constitution of California provides that—

> "There shall be in *each* of the organized counties " or cities and counties of the State, a superior court, " for *each* of which at least one judge shall be elected " by the qualified electors of the county or city and " county, at the general State election; *provided*, that " until otherwise ordered by the legislature, * * * " in the city and county of San Francisco, there shall " be elected twelve judges of the Superior Court, any " one or more of whom may hold court. There may " be as many sessions of said court, at the same time, " as there are judges thereof. * * * The judg- " ments, orders, and proceedings of any session of " the Superior Court, held by any one or more of the " judges of said courts respectively, shall be equally " effectual as if all the judges of said respective courts, " presided at such session."
>
> *Carter vs. Lothian*, 133 Cal., 451, 454.

Section 5 of article 6 of the State constitution provides, that the Superior Court in each county shall have jurisdiction

> " in all criminal cases amounting to felony, and cases
> " of misdemeanor, not otherwise provided for."

Perjury is felony in California, and a misdemeanor at common law. A superior court, or a session of a superior court of one county, cannot be held in another county; but in section 8 of article 6 provision is made that

> " a judge of any superior court may hold a superior
> " court in any county, at the request of a judge of
> " the superior court thereof; and upon the request of
> " the Governor, it shall be his duty so to do."

This, it will be noted, simply confers on the judge from another county, a power or qualification he would not otherwise possess, not having been elected a judge of the other court,

> " by the qualified electors of the county, or city and
> " county, at the general State election,"

as required by section 6 of article 6 of the State constitution. In other words, the above quoted portion of section 8 of article 6 simply fixes or prescribes the qualification of the judge from another county to hold a court to which he had not been elected; but all this was in law, to no purpose, as no provision was made for the *jurisdiction* of the special court so held, nor for any session of such a court, until the *casus omissus* in that particular was supplied and remedied by a constitutional amendment to section 8 of article 6, on the 8th day of November, 1910 (more than four years after the trial, conviction and sentence of appellant), whereby and wherein it is provided, for the first time,

> " that there may be as many sessions of a superior
> " court at the same time as there are judges thereof,
> " including any judge or judges acting upon request,
> " or any judge or judges *pro tempore*. The judg-
> " ments, orders, acts and proceedings of any session
> " of any superior court held by one or more judges
> " acting upon request, or judge or judges *pro tempore*,
> " shall be equally effective as if the judge or all of
> " the judges of such court presided at such session."

Prior to this amendment, itself an act of sovereignty by the people of the State, giving authoritative interpretation and construction to the State constitution, there was a similar provision in section 3 of article 6 (above quoted) with reference to a superior court held by one of its own elected judges, but having no application to a special court held by a special judge from another county. It was simply a case of *casus omissus* and necessitated the amendment to section 6 of article 6 above set forth. Of course, such a *casus omissus* could not be supplied or remedied by the legislature nor by the courts; it required a constitutional amendment. A *casus omissus* in a constitution cannot be supplied by judicial interpolation. This is very elementary law.

Jones vs. Smart, 1 T. R., 44;
McKuskie vs. Hendrickson, 128 N. Y., 555;
United States vs. Goldberg, 168 U. S., 95, 103;
Swift vs. Luce, 27 Me., 285;
Crawford vs. Spooner, 6 Moore's P. C., 9;
Holmberg vs. Jones, 7 Idaho, 752;
2 Sutherland on Stat. Constr., secs. 366, 498, 605.

Nor can a *casus omissus* be supplied by general usage or common consent. A constitution cannot be amended in that way; not even to avert mischievous or disastrous results or consequences.

2 Sutherland on Stat. Constr., pp. 891, 915; also secs. 366 and 498.

Courts will refuse to pervert the authority of the law to the validation of an unconstitutional practice or usage, no matter how aged or antiquated its supposed beneficial iniquities nor how disastrous the vindication of the supreme law in its condemnation. It would certainly be most unlawful for the courts to yield to a supposed urgent need either to uphold a past illegal practice or a false assumption of judicial power or a palpable usurpation of authority and

jurisdiction in violation of the Constitution. A so-called practical construction cannot supply a *casus omissus*, nor can time make legal a clear usurpation of power, no matter how long persisted in, by common consent or acquiescence.

Cooley's Const. Lim., 105, 106;
Kucker vs. Oil Co., 230 Penn. St., 528.

The California case of *Gardner vs. Jones*, 126 Cal., 614, is no authority against our contention. In the first place, the case relates only to the power of a judge and not to the jurisdiction of the court; in the next place, the opinion of the commissioner was not concurred in by the Supreme Court, the required three justices not assenting to it; and in the third place, no power exists to amend the constitution of the State by judicial construction or interpolation to the extent of supplying a *casus omissus;* and, finally, the constitutional amendment to section 8 of article 6, adopted by the people of the State November 8, 1910, is itself primarily an act of sovereignty, and, to the extent of its provisions, places an authoritative construction on the State constitution as to its previous meaning that is conclusive on the courts. Any other view would nullify the amendment by making the State constitution mean the same thing without the amendment as it does with it; this is not permissible in judicial construction (*State vs. Hostetter*, 58 Am. Rep., 515). Surely no one will contend that the provisions of the amendment were in terms incorporated in the State constitution prior to November 8, 1910, and no one will contend that the effect of the amendment can be imported or interpolated into section 8 of article 6 by implication merely from the fact that a judge of a superior court of another county is empowered to hold court in a county where he has not been elected; this only relates to the qualification of the judge to hold a court in the nature of a special court in a county other than the one electing him a judge. We say a "special court" because the regular court consists of elected judges of the county, and, as pointed out by Mr.

Justice Brewer, speaking for the court in *Ex parte Millington,* 24 Kan., 214, 224, an elective judiciary of the county is the constitutional principle the parties litigant are entitled to invoke in protection of their rights as against a special tribunal held by one who is not an elected judge of the county wherever the question is open for decision, from which it results that all special provisions at variance with this general principle established by the State constitution cannot be extended by implication or intendment so as to confer power or authority not expressly granted. Now, the special authority given a judge to hold a court to which he had not been elected is limited to the special purpose of fixing his official qualification and has no relation to the jurisdiction of the court. Where the regular court consists of twelve judges, there must be a special provision for the exercise of the court's jurisdiction by a court of but one judge, and this is particularly true of a court held by a judge from another county. Where the special provision is restricted to one of the twelve elected judges, it cannot be extended by construction to a court held by a judge from another county. Hence the necessity of the constitutional amendment of November 8, 1910, to section 8 of article 6, conferring on the court, *the special court* held by a judge from another county, the jurisdiction vested in the regular court of twelve elected judges. This constitutional amendment must be given legal effect, and that can only be done by holding there was no provision in the State constitution for the jurisdiction of a court held in San Francisco by a judge from another county, until the amendment introduced it. To hold otherwise is to nullify the amendment by making the State constitution mean the same thing without the amendment as it does with it. This the law will not permit. Therefore, it must be held that prior to the amendment there was no provision for the jurisdiction of the special court held by a judge from another county. Says Sutherland:

"The portions of the amended sections which are "merely copied without change are not to be con- "sidered as repealed and again enacted, but to have "been the law all along; *and the new parts or the "changed portions are not taken to have been the law "at any time prior to the passage of the amended "act.* The change takes effect prospectively accord- "ing to the general rule" (italics ours).

1 Sutherland, Stat. Constr., sec. 237.

Taking section 8 of article 6 of the State constitution as it stood prior to the amendment of November 8, 1910, it simply conferred on the judge from another county the power to hold court; but it is one thing to confer the power to hold court and quite another and essentially different thing to confer jurisdiction on the special court so held. The difference is the fundamental one between the power of the judge to hold court and the jurisdiction of the court so held. The judge is not the court.

State vs. Judges, 32 La. An., 1261;
Ex parte Gardner, 22 Nav., 280;
State vs. Woodson, 161 Mo., 453;
Lewis vs. Hoboken, 42 N. J. L., 379;
2 Sutherland, Stat. Constr., sec. 399.

The Superior Court of San Francisco County, at the time of the trial and conviction of appellant, was *a court of twelve judges*, with a special provision in section 6 of article 6 of the State constitution for the exercise and administration of the court's jurisdiction in a court held by one of the twelve elected judges, but extending no further. This special provision is of a three-fold character: first, it provides that the court may be held by any one of its own judges; secondly, it provides for sessions of the court so held; and, thirdly, it provides that—

"the judgments, orders, and proceedings of any ses- "sion of the Superior Court, held by any one or more "of the judges of said court shall be equally effectual "as if all the judges of said court presided at such "session."

This is limited, of course, to the regularly-elected judges of the court. A similar provision was inadvertently omitted from section 8 of article 6 of the State constitution with reference to a special court held by a judge from another county; and this *casus omissus* was not supplied nor remedied until the amendment of November 8, 1910.

A jurisdiction vested in a court of twelve judges cannot be exercised or administered by a court of one judge unless special and express provision is made for the purpose. This is very elementary law and would seem self-evident.

2 Sutherland, Stat. Constr., p. 1046.

And this necessary special provision can only be made by an amendment to the constitution; it cannot be done by statute. This also is well-settled law. An attempt was made in section 71 of the Code of Civil Procedure of California to supply the *casus omissus* in section 8 of article 6 of the State constitution, by providing that the judge from another county shall have the same power and authority as the *judge* whose court he holds. Aside from the point that the legislature could not amend the State constitution by statute, the provision in section 71 of the Code of Civil Procedure is confined to the power of the judge, and has no reference to the jurisdiction of the court. There are many powers the law confers on the judge, but they are altogether separate and distinct from the jurisdiction of the court. The distinction between the court and the judge is fundamental, as indicated in the authorities above cited. Nor will it do to say that the power to hold court as conferred upon the judge from another county, prior to the amendment of November 8, 1910, carries with it by necessary implication the same power vested in one of the regular judges to hold a court of competent jurisdiction. This would be proving too much, even if we assume that jurisdiction of a special court may be taken by implication in such cases. In the first place, it would obliterate the fundamental distinction between the power of a

judge to hold court and the jurisdiction of the court so held. It would be confusing things that are inherently independent and distinct in nature and power. In the second place it would render inoperative and meaningless the constitutional amendment of November 8, 1910, to section 8 of article 6, by making the State constitution mean the same thing without the amendment as it does with it; and in the third place, it would have the effect of making the Superior Court of San Francisco County a court of thirteen or more judges, instead of a court of *twelve* judges. This, of course, would be contrary to the State constitution, as held in

Ex parte Millington, 24 Kan., 214, 224, per Brewer, J.

By express provision of section 9 of article 6 of the State constitution, only the legislature can increase the number of judges beyond the twelve as originally fixed; and the additional judges must be elected in the same manner and by the same "qualified electors" of the county as are the original twelve. Then, too, the State constitution furnishes the determinative principle for its own interpretation upon the point involved, and this is conclusive on the judiciary. In the first place, *it creates a court of twelve elected judges,* and vests the jurisdiction in the court thus constituted. In the next place, it makes necessary and contains an express provision for not only the exercise and administration of the court's jurisdiction *by a court of one judge,* but in that respect requires and prescribes a provision for both the holding of the sessions of such a court, and that its judgments, orders, acts, and proceedings shall have the same force and effect as if all the judges of the court, to wit, in San Francisco, the entire elected twelve judges, presided at the session. It is self-evident that this principle of State constitutional law, derived from the constitution itself, makes necessary not only a provision fixing the qualification of the

judge from another county to hold a court to which he had not been elected, but it also requires a special provision for the sessions of such a court and a further special provision that the judgments, orders, acts, and proceedings of the court when so held shall be equally effectual as if all the regular twelve elected judges had held the court. These absolutely necessary provisions cannot be interpolated by judicial construction as to a "court" held by a judge from another county, but require an amendment to the State constitution such as was made November 8, 1910. On the other hand, there is no doubt about it that, so far as California courts could go in supplying the *casus omissus* in section 8 of article 6 by unauthorized judicial interpolation, they yielded to the need of amendment and went the entire distance of usurped power; but the point is that they exceeded their jurisdiction; that the law denied them all authority to amend the State constitution in requiring that the amendment be made by the people, and on a majority vote of the qualified electors voting thereon. The constitutional amendment of November 8, 1910, was a necessary measure to supply the *casus omissus* in section 8 of article 6 of the State constitution, and must be given the effect and operation to which it is legally entitled as an exercise of sovereign power by the people of the State. This can only be done by holding that prior to the amendment there was no provision in the State constitution for the jurisdiction of a special court held in San Francisco by a judge from another county, nor for the sessions of such court. The sovereign authority of the State has placed that construction upon the State constitution in the very act of amendment, and such construction is as conclusive upon the courts as is the amendment itself. Its legal effect is to eliminate and annul every judicial construction, prior and subsequent, that would tend to impair its efficacy and intrinsic character as a constitutional amendment. True, in a certain sense it was declaratory of a prior though unauthorized judicial construc-

tion, but for that very reason designed and intended to remedy the usurpation of power involved therein; that was the very purpose of the amendment; therefore, it must be given effect accordingly, and not nullified or rendered inoperative by holding that the amendment is not such, but merely a useless repetition of what was already the law of the constitution in the absence of the amendment. Courts have no power to thus completely annihilate a valid constitutional amendment. It results that the appellant was tried, convicted, and sentenced by a "court" with no jurisdiction whatever over either the person or subject-matter; therefore, he is deprived of his liberty without *due process of law*, and denied the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States. The imprisonment being therefore illegal, it is an unlawful obstruction to and invasion of the *treaty right* of return to the country granting appellant's extradition, the extradition case having been dismissed on motion of the prosecution.

XI.

An Ex Post Facto Law.

If the amendment of November 8, 1910, to section 8 of article 6 of the State constitution is to be applied to the trial, conviction, and sentence of the appellant, then clearly it is an *ex post facto* law, prohibited by section 10 of article 1 of the Constitution of the United States. It is well settled that the amendment can only be construed legally to operate prospectively and not retroactively.

1 Sutherland on Stat. Constr., sec. 237.

Any decision of the State courts to the contrary is in flagrant violation of section 10, article 1, of the Constitution of the United States, if applied to a criminal case.

To decide that the "court" held by Judge Burnett, in the trial, conviction, and sentence of appellant, had jurisdiction over the person and subject-matter is necessarily to give the constitutional amendment of November 8, 1910, a retroactive operation, and thereby make it an *ex post facto* law, in violation of section 10 of article 1 of the Federal Constitution. This conclusion is inevitable. It would also deprive the appellant of his liberty without *due process of law* and deny him the equal protection of the law, in violation of the Fourteenth Amendment.

State vs. Doherty, 60 Me., 504;
Pryor vs. Downey, 19 Am. Rep., 656.

The imprisonment being illegal, it is an unlawful obstruction to and invasion of the *treaty right* of return to the country granting the extradition, the extradition case having been dismissed on motion of the prosecution. It results that *habeas corpus* from the United States District Court is the proper remedy.

XII.

The Trial, Conviction, and Sentence Are in Violation of the Treaty and Law of the Extradition, and Void.

The trial, conviction, and sentence of appellant are in violation of the law of the extradition and of the treaty for the following reasons, viz:

1. Because of the supremacy and priority of the extradition jurisdiction held by the United States over the person of appellant *in custodia legis,* for the purpose of bringing him to trial to a final conclusion, upon the extradition charge, in enforcement of both the treaty of extradition and section 5275 of the Revised Statutes of the United States, the obvious implication of the statute being that the United States retains control of the custody of the accused from the time of the extradition surrender to the final conclusion

of the case. In fact, the statute expressly provides for the keeping of the accused in safe custody *by the United States*

> "until the final conclusion of his trial for the
> "crimes or offenses specified in the warrant of ex-
> "tradition, and until his final discharge from custody
> "or imprisonment for or on account of such crimes
> "or offenses, and for a reasonable time thereafter."

2. Because the treaty and statute, by necessary implication, prohibit the substitution of a like and derivative charge for the one upon which the extradition was granted, where an acquittal on the extradition charge would operate in law as a bar to the second accusation, or, in other words, to the substituted charge.

3. Because an extradition prohibited by the treaty, as being in fraud of its provisions, cannot be made the legal or competent basis of acquiring the necessary jurisdiction over a subsequent and derivative charge, dependent entirely on the pre-existence of a valid jurisdiction in the extradition case.

4. Because the Canadian extradition act, passed pursuant to article 6 of the convention of July 12, 1889, between the United States and Great Britain, prohibits the trial of appellant upon any other or different charge while the extradition case is pending and undetermined. And, first, as to the supremacy and paramount obligation resulting from the *extradition jurisdiction* acquired by and vested in the United States, over the person of the accused, and over the case, for the purpose of bringing him to trial to a final conclusion, in execution of the treaty requirement. The power and authority of the United States over the entire subject of international extradition pursuant to treaty, appertain to the sovereignty of the nation, and vest in the Federal government a jurisdiction *sui generis* over the person of the accused, absolutely exclusive of the several States.

In re Rauscher, 119 U. S., 407;
Holmes vs. Jennison, 14 Pet., 543, per Taney, C. J.;
People vs. Curtis, 50 N. Y., 324.

"The States have no jurisdiction in this matter, " and State legislation upon it is void."
1 Bishop, New Crim. Proc., sec. 224.

The extradition jurisdiction vested exclusively in the United States over the case and over the person of the accused, is altogether independent of and absolutely distinct from the local or municipal jurisdiction of the prosecuting State, and cannot be relinquished to the latter; the actual physical custody of the accused may be delivered over to State officials or State courts for the purpose of trial and punishment on the extradition charge, but the legal custody, the *custodia legis,* remains with the United States until the case has finally terminated by conviction, acquittal, or dismissal. On the former appeal the decision takes no note of this, but speaks only of one jurisdiction and that the jurisdiction of the prosecuting State, as in cases of interstate rendition, treating the Federal Government merely as a sort of police agent for the subordinate State, instead of possessing and exercising an independent jurisdiction over the person of the accused in right of the treaty, and of the exclusive authority conferred by the Constitution over the entire subject of international extradition. In all cases of extradition pursuant to treaty, the international warrant of extradition vests in the United States, not in the prosecuting State, an exclusive jurisdiction over the person of the accused for the treaty purpose of keeping him in safe custody and bringing him to trial in due course of law, and to a final conclusion upon the charge specified in the warrant. This legal obligation is imposed primarily on the United States both by the treaty and by section 5275 of the Revised Statutes. Manifestly, this high obligation cannot be transferred, nor its performance delegated to the prosecuting State, as the authority conferred over the subject is vested exclusively in the Federal Government. Without the extradition the subordinate or prosecuting State would not be able to acquire any local or municipal jurisdiction over the person or subject-matter:

"In this connection, jurisdiction of the 'case,' *i. e.*,
" the crime is undistinguishable from jurisdiction
" of the person who is charged with the crime."
In re Johnson, 167 U. S., 125.

Jurisdiction in the prosecuting State is acquired not by the commission of the crime, but by service of process upon the person of the accused. The proceeding is entirely *in personam and not in rem.*

Herndon vs. Ridgway, 17 How., 424;
Chaffee vs. Hayward, 20 How., 208, 215;
In re Johnson, 167 U. S., 124;
United States vs. Lee, 84 Fed., 631;
In re James, 18 Fed., 853.

The prosecuting State therefore must and does deraign its authority to try and punish the accused through the extradition, to wit: the action of the United States pursuant to the treaty and sections 5275, 5276 and 5277 of the R. S. U. S., in bringing the accused to trial in the State court; but the local or municipal jurisdiction is necessarily different from and subordinate to, though in furtherance of the paramount Federal extradition jurisdiction over the person of the accused, vested exclusively in the United States both by the treaty and the Constitution. This Federal jurisdiction is essential to the complete and effectual performance of the high obligations devolving on the United States in execution of the treaty requirement, and the enforcement of the provisions of sections 5275, 5276 and 5277 of the Revised Statutes. Of course there is nothing incompatible between this exclusive extradition jurisdiction vested in the Federal Government and the local or municipal jurisdiction of the prosecuting State, in respect to the specific charge on which the extradition was granted. On the contrary, the latter is a jurisdiction strictly in furtherance of the only legitimate purpose of the extradition, to wit: the trial of the extradition charge, to a final conclusion and the punishment or acquittal of the

accused. It is not necessary to determine whether the prosecuting State acts as the agent of the United States in the trial of the defendant, in carrying out the purpose of the treaty (*United States vs. Jones,* 109 U. S., 519, 520), or whether it would be competent for Congress to require that all extradition cases pursuant to treaty, be tried in the United States District Court (*Tennessee vs. Davis,* 100 U. S., 257, 266, 271). We are only concerned with the self-evident point that the extradition jurisdiction vested in the United States both by the Constitution and the treaty, is not the local or municipal or any jurisdiction of the subordinate prosecuting State, but the supreme and exclusive authority of the Federal Government in a matter confided exclusively to its national sovereignty, and that this jurisdiction of the Federal Government extends over the person of the accused from the time of surrender by the foreign country, until the final termination of the case in his conviction, acquittal, or dismissal. It follows, then, that the extradition jurisdiction vested in the United States by both the Constitution and the treaty over the person of the accused makes it impossible for the prosecuting State to acquire the requisite municipal and necessarily antagonistic custody to sustain a trial, conviction, and sentence on a subsequent charge of subsequent offense, while the Federal custody in the extradition case continues in control of the jurisdiction over his person for the purpose prescribed by the treaty and by section 5275 of the Revised Statutes.

Say the Supreme Court:

> "It is a principle of universal jurisprudence that "where jurisdiction has attached to a person or thing, "it is (unless there is some provision to the contrary) "exclusive in effect, until it has wrought its func-"tion."
>
> *Taylor vs. Taintor,* 16 Wall., 370.

It results that the Federal extradition jurisdiction, exclusive because the Constitution has made it such, and exclu-

sive because it is the jurisdiction first vesting over the person of the accused (*qui est tempore potior est jure*), continues in the United States until it has "wrought its function" in the final termination of the case.

Spear on Extradition, 126, 232, 233.

Concurrently with and in furtherance of this exclusive authority, the prosecuting State has the local or municipal jurisdiction to try and punish the accused on the extradition charge, but the altogether separate and distinctive extradition jurisdiction derived from the treaty and the Constitution remains with the United States until the case is ended, the power of the prosecuting State being one merely of municipal and subordinate authority, altogether dependent for its exercise on the extradition jurisdiction held by the Federal Government over the person of the accused in fulfillment of the treaty obligation. The several States are not and cannot constitutionally or legally be parties to the extradition, nor can the United States constitutionally or legally transfer the extradition jurisdiction to the prosecuting State. The case is simply this: The United States, in performance of its treaty obligations and in compliance with section 5275 of the Revised Statutes, keeps the accused in safe custody until the final termination of the case, bringing him to trial before the State court, on the charge specified in the warrant of extradition.

Of course, the United States cannot fulfill its treaty obligations nor perform the duties enjoined by section 5275 of the Revised Statutes if the prosecuting State may seize the custody of the accused, convict and sentence and imprison him upon some other charge for life or fourteen years in the State prison. Surely the several States cannot legally or at all thus interfere with, obstruct, or impede the performance by the United States of its treaty and statutory obligations. It was held on the former appeal that the State may legally try and sentence the accused upon a sub-

sequent charge of subsequent offense without first affording him an opportunity of returning to the country granting his extradition, and Spear is cited to sustain this conclusion. Now, we cite the same authority in support of our contention that this cannot be done until after the extradition case has first terminated. He says:

> "Hence arises the doctrine that the party accused "can be tried and punished only for the crime or "crimes named in the demand and delivery, and "that *when this end has been gained*, he should, "unless he elects to remain, or commits some other "crime after his extradition, be permitted to return "to the jurisdiction from which he was removed." (Italics ours.)
>
> *Spear on Extradition*, 71, 107, 569.

It is this principle the Crown officers relied upon as the basis of their opinion in the case of *Burley:*

> "We admit in this country that if a man is *bona* "*fide* tried for the offense for which he was given "up, there is nothing to prevent his being subse- "quently tried for another offense, either antece- "dently committed or not."
>
> *Spear on Extradition*, 197.

In accordance with this view the United States subsequently insisted on the right to try *Winslow* on an offense other than the one for which it was sought to extradite him. The British government disputed this claim; the controversy ended in a suspension of the treaty.

In the case of *Lawrence* the United States, adopting the views of the Crown officers in the *Burley case*, directed that Lawrence be first tried on the extradition charge before being placed on trial in respect to any other accusation.

2 Wharton's Digest Int. Law, 796.

The principle itself is amply sustained by international, constitutional, and the common law, and is essential to the

enforcement of the only possible legitimate purpose of a treaty of extradition and the legal rights it confers on the accused. We are sure that on the former appeal this principle was not given the consideration or recognition to which it is undoubtedly entitled. Nor did the learned court quite apprehend the point raised. It was not so much a proposition of a mere course of procedure or a mere question of practice as to a right of trial, as the court quite erroneously assumes, but it was a point of *jurisdiction*—as to whether the prosecuting State could acquire the requisite jurisdiction over the person of the accused on a subsequent charge of subsequent offense, while he was held by the United States, pursuant to the requirement of the treaty and of section 5275 of the Revised Statutes, *in custodia legis*, the paramount and supreme law of the extradition, for the one specific purpose of performing the high obligations imposed by the treaty and the statute in executing the treaty requirements of the extradition; whether the Federal custody of the accused could be legally interfered with, impeded, superseded, and nullified by the prosecuting State; whether upon a subject over which the United States is given exclusive jurisdiction by the Constitution, the prosecuting State can interpose its authority. How is the Federal Government to fulfill its treaty obligations consequent upon the extradition, or keep the accused in its safe custody until the final termination of the extradition case, as expressly required by section 5275 of the Revised Statutes, if the prosecuting State may seize him on another charge, convict and imprison him in respect thereto, for life or fourteen years in its State prison? These are the important questions not determined on the prior appeal, and now urged upon the court's attention with all proper emphasis.

As shown affirmatively in the record, the United States never surrendered appellant's custody to the State of California, nor to any representative of the State; and could not legally do so in any event except provisionally and condi-

tionally for the qualified purpose of carrying out the sole object of the extradition pursuant to the treaty. Clearly, the matter does not, as erroneously intimated on the former appeal, lie within the province or jurisdiction of the prosecuting State, to determine whether the high obligations enjoined upon the United States by the treaty, and by the Constitution in vesting exclusive authority over the entire subject of international extradition in the Federal Government, and by section 5275 of the Revised Statutes, in requiring the United States to maintain the requisite *custodia legis* over the accused, whether these paramount obligations shall or shall not be performed. Even if the prosecuting State had sole jurisdiction in such matters, its obligation to comply with the *treaty* requirement would still make it imperative to first dispose of the extradition case before prosecuting the accused on a subsequent charge of subsequent offense, for the treaty is the supreme law of the land and must, therefore, be *first* complied with in priority over all the local or municipal laws and jurisdictions of the prosecuting State. This, too, is a fundamental principle, not given on the former appeal, the consideration or recognition to which it is legally entitled. When once it is perceived that the question is not a matter of municipal law at all, but one pertaining to indisputable obligations imposed by the treaty, the Constitution and the statute on the Federal Government, and that the extradition jurisdiction over the person of the accused is vested exclusively in the United States in order that these paramount obligations may be fully and properly performed by the Federal Government, there will not be the slightest difficulty in deciding that the State of California acquired no jurisdiction over the person of appellant in prosecuting him on a subsequent charge of subsequent offense, while the extradition case was pending and he was held in Federal *custodia legis* in virtue of the law of the extradition. The prosecuting State is amply protected in the right to maintain a prosecution of the subsequent charge of subsequent offense, *after* the Federal extradition jurisdiction is finally

terminated by conviction, acquittal or dismissal on the charge specified in the international warrant of extradition, and need not first afford him any opportunity to return to the country issuing this warrant. The question is entirely one of jurisdiction. Surely the Federal jurisdiction over the person of the accused must begin and end somewhere, and the determinative question is, Where does it begin, and where does it end? It is not a jurisdiction that can be held by the State because it is exclusively vested in the United States, by the Constitution and by the treaty, and by section 5275 of the Revised Statutes. It is a jurisdiction supreme and paramount over and absolutely independent of all State process. The extradited accused is not brought into the United States by authority of any State process whatever. On the contrary, his custody is vested in the United States by virtue of the international warrant of extradition and continues so vested until the case is finally terminated. Of course we never contended that the State could not legally prosecute on the subsequent charge of subsequent offense. Our contention was that according to all the writers on international law this could only be done upon a new extradition; but the court held on the former appeal that such is not the meaning of the treaty, and we are not at this time disputing the correctness of that conclusion. We are simply insisting that the State cannot acquire the requisite jurisdiction over the person of the accused on a subsequent prosecution for a subsequent offense, until the Federal extradition *custodia legis* is first terminated by his conviction, acquittal or dismissal on the extradition charge.

The provision in the international warrant of extradition that the custody of the accused be delivered to such person or persons as the United States may appoint, is intended to maintain throughout all subsequent proceedings, the exclusive authority of the United States over the person of the accused in execution of the paramount purpose of the treaty, in promised fulfillment of which the custody was obtained and entrusted.

Whatever the jurisdiction of the State of California in the matter of a subsequent prosecution of a subsequent offense, it is necessarily subordinate to the Federal *custodia legis* in the extradition case, and must be held in abeyance until the case has been finally disposed of by the conviction, acquittal, or dismissal of the accused. It results that the conviction, sentence, and imprisonment of the appellant on a subsequent charge of subsequent offense, while the extradition case was pending and undetermined, constitutes an infringement or invasion of the paramount extradition jurisdiction held by the United States over the person of the accused, in execution of the treaty and of section 5275 of the Revised Statutes, over all of which matters exclusive authority is granted by the Constitution to the Federal Government. The necessary effect of the action taken by the State was to prevent the United States from performing the functions and obligations devolving upon it in consequence of the extradition, and to completely annihilate the extradition jurisdiction over the person of the accused. This was manifestly in violation of the treaty and the statute. It was also in flagrant violation of the exclusive jurisdiction conferred by the Constitution upon the United States in all cases of extradition pursuant to treaty. While the accused was held in Federal custody in the extradition case, it was impossible for the State of California to acquire the necessary jurisdiction over his person on a subsequent prosecution for an alleged subsequent offense. The theory that after the accused had been brought before the State court on the extradition charge that thenceforth it became merely a matter of local and municipal jurisdiction is manifestly untenable; it would operate to entirely destroy the extradition jurisdiction and nullify the provisions of section 5275 of the Revised Statutes; for obviously the United States can have no constitutional authority over cases exclusively within the province of the local criminal law of the State. This consequence is itself conclusive against any power in the prosecuting State to assume custody of the accused for a

purpose not within the scope of the extradition jurisdiction, as it is everywhere conceded that section 5275 of the Revised Statutes is perfectly valid and constitutional, and applies to every case of international extradition pursuant to treaty. This statute expressly requires the United States to keep the accused in its own safe custody until the extradition case is finally terminated. The Federal and State governments are as separate, distinct, and independent in their respective governmental authority as if their jurisdiction were set apart and segregated by visible, tangible boundary lines. No person *in custodia legis* of the one can be seized by the other, except in cases where the Federal authority is exclusive, as in the *Neagle case*. So, too, it must be borne in mind that jurisdiction in criminal cases is not acquired by the act or acts constituting the offense, but only by service of process upon the accused, which in cases of extradition is accomplished by the international warrant of extradition for all purposes of criminal prosecution on the charge therein specified. Where you cannot legally serve local process issued on another charge by taking legal custody of the accused (and no two different governments can have custody of the same person at the same time) because of a pre-existing *custodia legis* of another sovereignty or of another jurisdiction, you cannot acquire the necessary authority or jurisdiction over his person, but must wait until the jurisdiction first vesting in point of time and legal right is terminated in due course of law. This is emphatically and especially true of an exclusive jurisdiction vested in the United States, such as the Federal extradition jurisdiction conferred by the Constitution and defined by section 5275 of the Revised Statutes as commencing with the surrender of the accused by the foreign country and ending with his final discharge in the extradition case. Undoubtedly the Federal statute could have legally provided for the delivery of the accused by the United States to the prosecuting State, and that upon his being so delivered the Federal jurisdiction

over him should cease and terminate; but instead of this we have an express statutory enactment, perfectly valid and perfectly constitutional, extending the Federal jurisdiction over the person of the accused from the time he is taken into the custody of the United States, by virtue of the international warrant of extradition, until his final discharge in the extradition case. Therefore the extradition jurisdiction thus made exclusive in the United States necessarily prevents the prosecuting State from acquiring any jurisdiction whatever over the accused upon any subsequent charge of subsequent offense until the final termination of the extradition case. To decide that the State of California had a local jurisdiction to elect whether the extradition case or the subsequent charge should be prosecuted is to nullify the extradition jurisdiction vested exclusively in the United States and the high obligations imposed upon the Federal Government by the treaty and the statutes in virtue of the extradition. The State must first secure the final termination of the extradition case before it can proceed in the lawful exercise of its local or municipal jurisdiction on the subsequent charge of subsequent offense; until then it is impossible to acquire the requisite jurisdiction over the person of the accused on the subsequent prosecution, and because of the pre-existing *custodia legis* in the Federal Government. For these reasons the State of California had no authority to convict or imprison the appellant upon the second perjury indictment, and its action is in violation of the prior extradition jurisdiction vested exclusively in the United States in enforcement of the treaty and the provisions of section 5275 of the Revised Statutes. If this is not the law, then it must result that there is no extradition jurisdiction vested in the United States over the person of the accused, and no custody acquired by the Federal Government in virtue of the international warrant of extradition. Such being the case, or rather if such is the case, then sections 5275, 5276, and 5277 of the Revised Statutes are

unconstitutional and void for want of power in Congress to enact legislation concerning the administration of the criminal laws of the several States in the matter of safeguarding and protecting the custody of the accused, and it must follow also that the United States has neither exclusive nor any other authority over the subject of international extradition pursuant to treaty; that the entire jurisdiction is vested in the prosecuting State and the Federal Government is merely a police agent of the State.

Of course this is all very preposterous. The United States has exclusive authority over the subject of international extradition pursuant to treaty. The United States has solemnly represented to another nation that if it will grant the extradition of the accused upon a specific charge, pursuant to the requirements of the treaty, he will be brought to trial in due and regular course of law and to a final conclusion upon the charge so specified. This is the obligation the United States has undertaken to perform absolutely and unconditionally; it is the obligation enjoined upon the United States by the *treaty*, and in consequence of the extradition. To enable the United States to perform this obligation, it is given the legal custody of the accused by the international warrant of extradition, and provision is made in sections 5275, 5276, and 5277 to adequately maintain and protect this Federal custody until the final discharge of the accused *in the extradition case.*

No doubt the prosecuting State may dismiss the case, and this will terminate the extradition jurisdiction held by the United States over the person of the accused; but while the extradition jurisdiction continues, and the accused is held in Federal custody by virtue of the treaty and the statute, the prosecuting State cannot lawfully seize his custody or acquire the necessary jurisdiction of his person on an independent and collateral prosecution for an alleged subsequent offense; this for the manifest reason that the extradition jurisdiction is supreme and exclusive; it is essential to en-

able the United States to perform its treaty obligations in the matter of the extradition and to enforce the provisions of sections 5275, 5276, and 5277 of the Revised Statutes. The United States may entrust the actual or physical custody of the accused to the prosecuting State for the purpose of trial to a final conclusion on the extradition charge, retaining throughout the legal and constructive custody for the purpose of fulfilling the treaty obligations; but the United States cannot relinquish or entrust the extradition custody of the accused to the prosecuting State, upon a subsequent charge of subsequent offense, for that would be to defeat the extradition jurisdiction over his person,—a virtual renunciation and repudiation of the obligations imposed by the treaty and also by the statute. The case simply resolves itself into the elemental question: Can the several States take jurisdiction over a person or thing held in *custodia legis* by the United States in virtue of an exclusive authority conferred by the Constitution? There can be but one answer, and that in the negative.

It follows that the conviction and imprisonment on the second perjury charge are in contravention of the extradition jurisdiction held by the United States over the person of appellant in enforcement of the treaty and the statute. There is but one jurisdiction over the person of the accused, and that is the jurisdiction conferred by the international warrant of extradition; on the basis of this jurisdiction the accused is brought to trial before the court of the prosecuting State, and no further or other process is required for the purpose. Throughout all the proceedings in the State court he is held in custody solely by authority of the warrant of extradition. It becomes *functus officio* only in the event of conviction or acquittal or dismissal of the case. The prosecution in the State court, to be valid, must be in furtherance of the extradition jurisdiction held by the United States pursuant to the treaty and the statute, until the final discharge of the accused. No other prosecution is authorized

until after the extradition jurisdiction has finally terminated in the conviction, acquittal, or dismissal of the accused. If it is competent for the prosecuting State to determine whether the high obligations imposed upon the United States by the treaty, or the equally important duties of safe custody and protection enjoined upon the Federal Government by sections 5275, 5276, and 5277 of the Revised Statutes, and extending to the final termination of the case, shall or shall not be performed; if it is competent for the prosecuting State to abolish and obliterate the extradition jurisdiction vested exclusively in the United States both by the international warrant of extradition in right of the treaty, and by section 5275 of the Revised Statutes in requiring the United States to take and maintain the custody of the accused, and hold it until the final termination of the extradition case, in enforcement of the treaty, and for the performance fully and adequately of the obligations and the duties incidental to the extradition jurisdiction vested exclusively in the Federal Government by the Constitution; if it is competent for the prosecuting State to supersede the Federal custody of the accused the moment he is brought within the territory of the State, and thus make it impossible for the United States to keep him in its own safe custody pursuant to the international warrant of extradition until the final termination of the case, as required by the treaty and the statute; or if it be the law that the extradition jurisdiction held by the Federal Government over the person of the accused, ends and terminates the moment he is brought within the territory of the prosecuting State, the treaty and the statute to the contrary notwithstanding, then, but not otherwise, it is competent for the prosecuting State to convict the accused and imprison him upon a subsequent charge of subsequent offense, while the extradition case is pending and undetermined, which, in appellant's case, was not until July 12, 1909, more than three years after his conviction upon the subsequent charge. It being conceded, as it must, that the Constitution vests exclusive jurisdiction

in the United States over the entire subject of international extradition pursuant to treaty; it being conceded, as it must, that the United States acquires the custody of the accused by virtue of the international warrant of extradition, for the purpose of complying with the requirements of the treaty, it is only necessary to determine where and when that extradition jurisdiction ends and terminates in order to correctly decide the question whether the prosecuting State can lawfully convict and imprison the accused on a subsequent charge of subsequent offense, while the extradition case is pending and undetermined. Section 5275 of the Revised Statutes is very explicit that the Federal extradition jurisdiction over the person of the accused, ends and terminates only after "his final discharge from custody or imprisonment for or on account" of the offense specified in the international warrant of extradition. And this would be the law in the absence of the statute, because it is "a universal principle of jurisprudence" governing all jurisdiction wherever vested.

XIII.

Evasion of Treaty.

The treaty and the statute by necessary implication prohibit the substitution of a like and derivative charge for the one upon which the extradition was obtained, where an acquittal on the extradition charge or a conviction would constitute a bar to the substituted charge. In any event, where an acquittal would be *res adjudicata* of an essential element in the subsequent accusation. This proposition is self-evident, and absolutely necessary to conserve and protect the treaty rights vested in the accused, and maintain inviolate the treaty obligations resulting from the extradition.

The first perjury indictment was based on an averment of marriage; this was the extradition case. The second perjury indictment was based on a charge as to the identity of the

parties to the same marriage ceremony relied upon by the prosecution to sustain the charge in the extradition case, though it was not alleged in the second perjury indictment that the ceremony constituted a legal or valid or any marriage with the prosecutrix or any one else; nor that the parties to the ceremony thereby intermarried and became husband and wife. It is too plain for argument that an acquittal in the extradition case would be *res adjudicata,* and a bar to the second perjury indictment derived from and dependent upon the extradition charge.

United States vs. Butler, 38 Fed., 499.
Coffey vs. United States, 116 U. S., 436, 446.
Cooper vs. Com., 106 Ky., 909.

By the scheme of dropping the extradition charge and substituting the second perjury charge the accused was defrauded of the legal right given him by the treaty and the law of the extradition to obtain an acquittal in the extradition case, and thus maintain the treaty rights and obligations that would otherwise be defeated by the subsequent prosecution. Where the subsequent charge of subsequent offense is so inseparably related to and connected with the extradition charge as to be altogether derivative from and dependent upon it, to such an extent that it must necessarily fall with the first charge in the event of acquittal, it is not a separate prosecution on a separate offense within the doctrine of *Collins vs. O'Neil,* 214 U. S., 113, but merely a fraudulent evasion of the extradition and its legal consequences. It is not so much the commission of a new crime as a repetition of the old one, if any crime at all—a sort of continuing offense within the general principle declared in *Ex parte Snow,* 120 U. S., 274, for which there could be but one penalty. Otherwise, if the accused in the same litigation repeated the same alleged perjury in his testimony ten different times, he could, if prosecuted therefor, be punished to the extent of an aggregate prison term of one hundred and

forty years, which is sheer nonsense. It results that the trial, conviction, sentence, and imprisonment are flagrantly in violation of the legal rights granted the appellant by the paramount law of the extradition. Says a distinguished authority:

> "A man is charged, say, with forgery. Extradition is granted. He is tried in America and acquitted." (The case against us was dismissed.) "It is clear that if all the facts which came out on the trial had been known to the committing magistrate, he would not have been extradited at all on that charge. What right, then, has the State, which has only got hold of him as presumably guilty of that offense, to deal with him on another charge, in a way that they could not have done if he had not been in the first instance unjustly accused? They are in such a case as I have supposed,—I use the phrase in a legal and not in a moral sense, taking advantage of their own wrong."
>
> *Foreign Rel. U. S.*, 1876, p. 279.

It is manifest that the second perjury prosecution was in open and notorious violation of the paramount law of the extradition; and the extradition case having now been dismissed, since the last appeal, the appellant is entitled to his release on *habeas corpus* from the United States District Court in order that he may avail himself of the treaty rights granted him, and to which the imprisonment is an unlawful obstruction.

XIV.

Fraudulent Extradition.

An extradition prohibited by the treaty, as being in fraud of its provisions, cannot be made the legal or competent basis of acquiring the necessary jurisdiction over a subsequent and derivative charge of perjury, dependent entirely on the absolute validity of the extradition (*Ewington's Case*, 2 Moody C. C., 223; 2 *Whart., Crim. Law*, 11th ed., secs.

1521, 1536). If, as set forth in the record on this appeal, the appellant was extradited at the instance of the State of California for the purpose of answering civil liabilities, and without any intention to prosecute the extradition charge to a final conclusion, then plainly this was a fraud upon the treaty.

Pooley vs. Whetham, 15 Ch. Div., 435.

> "To profess an intention to do or not to do, when " the party intends the contrary, is as clear a case of " misrepresentation, and of fraud, as could be made."
> 1 *Bigelow on Fraud,* p. 484.
> *Donaldson vs. Farwell,* 93 U. S., 631.

Whatever the State of California did or intended in obtaining through the Government of the United States, the extradition of appellant is, of course, and on elementary doctrine, imputable to the latter. This is the theory upon which the averments are made in the complaint, both in reference to the purpose of the United States and that of the State in obtaining the extradition, though it is explicitly alleged that had not the State afterwards seized the custody of the accused on the subsequent charge of subsequent offense, the United States would have brought him to trial, to a final conclusion in the extradition case. In the first instance we impute the intent and purpose of the State of California to the United States. In the other instance we do not; but assuming it to have existed when the extradition was obtained, we allege a subsequent purpose of the United States to comply in good faith with the treaty and the law of the extradition; but make no such allegation in respect to the State of California.

On the facts alleged in the complaint, the State of California became a trespasser *ab initio,* and the subsequent prosecution is as much a fraud on the treaty as was the original extradition itself. Now, in perjury cases, to sustain the accusation, there must be a valid and lawful jurisdiction in the court where the assailed testimony was given.

2 Whart., Crim. Law, 11th ed., secs. 1521, 1536.

And of course that is not possible where the jurisdiction is fraudulently obtained. It results that because of the fraud no valid jurisdiction vested in the State court in the extradition case.

Fraud vitiates all jurisdiction thereby obtained in perversion of legal authority.

Rex vs. Serva, 1 Den. C. C., 104.
Wells vs. Garney, 8 Barn. & Cress., 769.
Dunlap vs. Cody, 31 Ia., 260.
Borden vs. Fitch, 15 Johns., 421.
Ilsley vs. Nichols, 12 Pick., 269, 275, per Shaw, C. J.

> "If a man is wrongfully brought into a jurisdiction
> " and there lawfully arrested, yet he ought to be dis-
> " charged, for no lawful thing, founded upon a
> " wrongful act, can be supported."
>
> *Ex parte Allen,* 13 Blatchf., 275.
> *Hooper vs. Lane,* 6 H. L. Cas., 443.

The principle we invoke applies only to fraudulent or illegal perversions of the treaty, not to smuggling or kidnaping, as in *Ker vs. Illinois,* 119 U. S., 443. It results that, because of the fraud upon the treaty and the law of the extradition, the appellant is illegally deprived of his liberty and entitled to his discharge on *habeas corpus* from the United States District Court, as the United States will not permit its exclusive authority in extradition cases pursuant to treaty, to be fraudulently used for purposes prohibited by the treaty.

XV.

Canadian Extradition Act.

The Extradition Act of Canada, passed pursuant to article six of the Convention of July 12, 1889, and referred to in the warrant of extradition set forth in the complaint, prohibits the trial of appellant upon any other or different charge while the extradition case is pending and undetermined

(Rec., p. 18). We have heretofore in this brief established the point as being also one of constitutional, statutory, and likewise of international law; but we are entitled to the benefit of the Canadian Extradition Act in addition to the rights thus given us, as it is just as much a part of the international warrant of extradition as if expressly written therein. The treaty not only provides in article six for this legislation by Canada, but the general imperial Extradition Act of Great Britain in section eighteen in terms provides for its own suspension by "order in council," as was done in the case of Canada in order to give competent legal operation to the Canadian Extraditon Act (*Clarke on Extradition,* 125, 4th ed.). It is, therefore, that the international warrant of extradition makes reference to the Canadian Extradition Act as the source of its authority.

We do not contend that the Canadian Extradition Act operates to amend the *treaty*. On the contrary, we insist that it is in entire accord with the treaty, and that the provisions of the act are expressly authorized by section six of the Convention of 1889; but we do most emphatically maintain that the requirement of the Extradition Act, that the extradition case be first determined and the extradition custody of the accused be first terminated before he can lawfully be arrested and put to trial on another and different charge, is also the obvious intent and meaning of the *treaty,* in providing for the extradition, and in prescribing the purpose for which it is granted. The custody thereby vested in the United States, pursuant to the international warrant of extradition, over the person of the accused, of necessity extends to the termination of the case, and is supreme as well as exclusive over all local or municipal jurisdiction of the prosecuting State, upon a subsequent charge of subsequent offense, especially where the latter is merely derivative and would be barred by an acquittal on the extradition charge. Then again, were we to assume, contrary to section 5275 of the Revised Statutes of the United States, and contrary to

international law, that the *custodia legis* under the international warrant of extradition, held by the United States over the accused, in execution of the treaty requirement, ended with the physical transportation of his person to the prosecuting State for the purpose of trial, the latter government would still be prohibited from proceeding against him on a subsequent charge of subsequent offense, until *after* the extradition case had been first determined by his conviction, acquittal or dismissal, for by the explicit language of section 2 of article 6 of the Constitution of the United States the *treaty* is—

> "the supreme law of the land; and the judges in "every State shall be bound thereby, anything in the "Constitution or laws of any State to the contrary "notwithstanding."

Therefore the prosecuting State has no right or power of election between the extradition case and a subsequent charge of subsequent offense, but must first determine the charge on which the extradition was granted and obtained; otherwise the *treaty* would not be the "supreme law of the land." This is the conclusive point entirely overlooked by the court on the previous appeal in virtually holding that the question was merely one of local or municipal law of the prosecuting State, as to procedural priority in the matter of a trial, precisely and to the same extent as if there had been no extradition at all, thus obliterating entirely the paramount obligations imposed on both the State and the United States by the supreme law of the extradition, prohibiting a trial upon another charge until after the extradition case has been first determined pursuant to the requirement of the *treaty*, none the less imperative because derived from its provisions by a necessary and logical implication. No other conclusion is possible except the utterly preposterous one that, though the very existence of the treaty is for the purpose of extradition, yet it does not require the prosecuting State to

bring the accused to trial on the specific charge upon which he was extradited. As the *treaty* requires the trial, and as it is the supreme law of the land, it follows that until after the extradition case is first determined, the accused cannot be brought to trial on a subsequent charge of subsequent offense, for the local criminal law of the prosecuting State is made subordinate and subject to the requirement of the treaty, by section 2 of article 6 of the Constitution of the United States. It is not, as quite erroneously supposed by the court on the former appeal, a mere question of local or municipal law of the prosecuting State as to the order of trial on two pending indictments, but it is a question of both constitutional and international law, the meaning of the treaty, the meaning of the Canadian Extradition Act, the meaning of sections 5274, 5275, and 5276 of the Revised Statutes of the United States, the meaning and extent of the extradition jurisdiction vested exclusively in the Federal Government over the person of the accused in execution of the treaty, and the meaning of the provision in the Constitution denying all authority to the several States over the subject of extradition, and conferring the power in its entirety upon the United States in right of its national sovereignty; and finally, it is a question as to which is supreme, the local criminal law of the prosecuting State or the Constitution, treaty, and laws of the United States.

XVI.

Sentence Violates Constitution—Fourteenth Amendment.

The sentence imposed upon appellant, to wit, fourteen years in the State prison, is based upon section one hundred and twenty-six of the Penal Code of California, which is as follows, viz:

> "Perjury is punishable by imprisonment in the "State prison, not less than one nor more than four-"teen years."

Section one hundred and thirty-two of the Penal Code provides, under the title of "Falsifying Evidence," as follows, viz:

> "Every person who, upon any trial, proceeding, "inquiry, or investigation whatever, authorized or "permitted by law, offers in evidence as genuine or "true, any book, paper, document, record, or other "instrument in writing, knowing the same to have "been forged or fraudulently altered or antedated, is "guilty of felony."

No specific penalty is prescribed, but section eighteen of the same code covers the case, and is as follows, viz:

> "Except in cases where a different punishment is "prescribed by this code, every offense declared to "be a felony, is punishable by imprisonment in the "State prison, not exceeding five years."

Therefore if, instead of being charged with perjury in giving oral testimony as to the identity of the parties participant in a void marriage ceremony, the appellant had been charged with introducing in evidence a forged or fraudulently altered certificate of marriage, even of a valid and not a void marriage, and covering the same point as that to which his oral testimony was addressed, the penalty could not exceed five years' imprisonment in the State prison. Is this classification of *false evidence* as the basis of a criminal prosecution essentially arbitrary in its discrimination against those committing perjury in oral evidence given upon the trial of a case, and, if it is, does it violate the provision of the Fourteenth Amendment of the Constitution of the United States against the denial of the equal protection of the laws of the State? Manifestly there is no reason for the discrimination in the matter of penalty; both sections of the code pertain to false evidence given on the trial of a case; the more serious offense is false documentary proofs, as evidence by formal instrument is considered of greater probative value than the evidence of witnesses, because usually more reliable.

Nor is the presence or absence of an oath any ground for the discrimination in penalty, especially as section 2097 of the Code of Civil Procedure of California expressly provides that:

> "Any person who desires it may, at his option, in-
> "stead of taking an oath, make his solemn affirma-
> "tion or declaration, by assenting, when addressed in
> "the following form: 'You do solemnly affirm (or
> "declare) that,' etc., as in section two thousand and
> "ninety-four."

The latter section provides for the form of an oath:

> "That the evidence you shall give in this issue (or
> "matter) pending between —— —— and —— ——
> "shall be the truth, the whole truth, and nothing
> "but the truth."

It is impossible to perceive any substantial reason for the vast difference in penalty between section one hundred and twenty-six of the Penal Code of California and section one hundred and thirty-two of the same code. They both relate to the crime of giving false evidence on the trial of a case; and yet, without any just or reasonable cause for the classification in the matter of penalty, false oral evidence is punishable with an imprisonment of from one to fourteen years in the State prison, and false documentary evidence is punishable with an imprisonment of from one to five years in the State prison. We should say in this connection that section one hundred and nineteen of the Penal Code defines an oath as the basis of a charge of perjury to include "any affirmation and every mode authorized by law of attesting the truth of that which is stated." By section one thousand eight hundred and twenty-seven of the Code of Civil Procedure of California it is provided as follows, viz:

> "There are four kinds of evidence: 1. The knowl-
> "edge of the court. 2. The testimony of witnesses.
> "3. Writings. 4. Other material objects presented
> "to the senses."

From these various provisions it is manifest that the discrimination in penalty between false evidence by oral testimony in the trial of a case and false evidence by documentary proofs on a trial of a case, is essentially arbitrary. In fact, it would seem that, if any distinction is to be made in reason and justice, it should require a greater penalty for false documentary evidence, not only because it is usually considered of greater probative value than oral testimony, but because added to the wrong done against the administration of public justice is the separate crime of forgery and the guilty uttering of a forged instrument.

It follows that section one hundred and twenty-six of the Penal Code of California, so far as it exceeds the penalty of five years' imprisonment in the State prison, is a denial to appellant of the equal protection of the laws of the State of California in arbitrarily discriminating against him in the matter of penalty for giving false evidence in the trial of a case.

Yick Wo vs. Hopkins, 118 U. S., 356, 367.
Gulf, etc., Ry. vs. Ellis, 165 U. S., 165.
So. Ry. Co. vs. Greene, 216 U. S., 400, 412.
Barbier vs. Connolly, 113 U. S., 27.

He is charged with perjury in giving false testimony in respect to the identity of the parties participant in a mere marriage ceremony not alleged to constitute a legal marriage. The sentence of fourteen years in the State prison is the punishment inflicted. If, as already stated, instead of his oral testimony he had knowingly offered in evidence, and caused to be received in evidence, a false and forged certificate of marriage, covering the same point, the maximum penalty could not exceed five years' imprisonment. The discrimination is obvious and arbitrary.

Or put the case in this wise: Smith testifies as a witness on the trial of a case that a certain marriage ceremony was between himself and a certain woman; this testimony is false, the fact being that the ceremony was between him and

another woman. He is convicted of perjury and under section one hundred and twenty-six of the Penal Code of California he is sentenced to the maximum penalty of fourteen years' imprisonment in the State prison. Compare with this the case of Jones: On the trial of a case also involving a question of marriage with a certain woman, he offers and causes to be received in evidence a false and forged certificate of marriage, showing the marriage to have been between himself and a woman who was not a party to it at all. For thus presenting false documentary evidence he is prosecuted and convicted under section one hundred and thirty-two of the Penal Code of California and given the maximum penalty of five years. Clearly such classification is essentially arbitrary, and deprives Smith of the equal protection of the laws of the State. There is no good reason whatever for inflicting a heavier maximum penalty on him than is inflicted on Jones, whose offense in the injury done public justice is *prima facie* of greater gravity because involving the commission of two crimes instead of one—forgery and falsification of evidence. It is true that section one hundred and thirty-two of the Penal Code speaks of *offering* false documentary evidence in the trial of a case; but this also is the nature of perjury. It is technically known in criminal law as an *attempt* (*1 Bishop, New Crim. Law*, sec. 437). It is an attempt to subvert justice in a judicial proceeding.

XVII.

Sentence, Cruel and Unusual Punishment—Not Due Process of Law, etc.—Is Unlawful Obstruction to Treaty Right.

It appears affirmatively from the record that no judgment, decree, order, verdict, or judicial proceeding could by any possibility have been procured, induced, or influenced by the alleged perjury; and that there was no possibility of detriment or prejudice to public or individual rights. As the possibility of injury is an essential element in perjury

(*2 Whart., Crim. Law,* secs. 1520, 1546, 11th ed.; *People vs. McDermott,* 8 Cal., 288, 290; *People vs. Jones,* 123 Cal., 299), the punishment must be reasonably graduated and proportioned to the wrong done—the minimum penalty for the minimum injury, which in California is one year's imprisonment in the State prison, not the maximum penalty of fourteen years' imprisonment, appropriate only to the most injurious and disastrous consequences, such as obtaining by perjured evidence the imprisonment of an innocent man for life in the State prison, or taking by means of judicial decree, itself the direct result of perjury, a man's home or all that makes home valuable, or perjured testimony destructive of personal *status,* or seriously prejudicial to public interests in permanent injury, and like cases of a special enormity; never to cases where there is no possibility of injury to person or property or public interests, nor to cases where no judgment, order, decree or judicial proceeding is induced or influenced by the perjury, and where such a thing is impossible.

If section one hundred and twenty-six of the Penal Code of California is to be construed as permitting the maximum penalty of fourteen years' imprisonment, where only the minimum penalty of one year is reasonably and justly proportionate to the offense as measured and limited by the facts and circumstances of the particular case, then it is arbitrary legislation, clearly unconstitutional, because a denial of the equal protection of the laws and a deprivation of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. There can be no question whatever, that the sentence imposed on appellant is grossly excessive and illegal on the facts presented in the complaint, appearing in the record. In the first place, it exceeds, by thirteen years, the statutory principle of the minimum penalty for the minimum injury. In the next place, it violates the constitutional principle that the penalty be graduated and proportioned reasonably and justly to the offense

as measured and limited by the facts or circumstances of the particular case. In the next place, it exceeds the usual and average sentence in California, in perjury cases, by eleven years. It exceeds the average or maximum sentence in California, as fixed by section eighteen of the Penal Code in cases of felony generally by nine years. It exceeds the maximum penalty for the more serious offense of introducing false documentary evidence on the trial of a case, by nine years. It exceeds the maximum prison penalty for perjury in the United States courts by nine years, properly analogous, not only as a superior standard of punitive justice, but for the further reason that the alleged perjury was committed in a Federal extradition case, if at all. It exceeds the maximum penalty in California for misprision of treason by nine years. It exceeds the maximum prison penalty in California by nine years in each of the following offenses, viz: 1. Train robbery. 2. Presenting false and fraudulent claims. 3. Preventing legislature from convening. 4. Altering legislative bill. 5. Altering enacted bill. 6. Embracery. 7. Falsifying jury list. 8. Bribery of witness. 9. Death as result of intoxication of railroad employee. 10. Death from omission to properly label drugs. 11. Death from failure to comply with physician's prescription by substituting wrong drug. 12. Death by mischievous animal permitted by owner to go at large, knowing propensity. 13. Aiding another to commit suicide. 14. Forging telegraph or telephone message. 15. Marriage by false personation. 16. Extortion by force. 17. Destruction of jail or prison.

The sentence imposed on appellant exceeds by four years the maximum penalty in California for killing a human being by means of voluntary manslaughter. It exceeds by four years the maximum penalty for kidnapping. It exceeds by seven years the maximum penalty for killing a human being in a duel. It exceeds by four years the maximum penalty for bribery of the legislature. It exceeds by four years the maximum penalty for bribery of a judge. It

exceeds by four years the maximum penalty for receiving such a bribe. It exceeds by four years the maximum penalty for death by culpable collision. And many like instances showing the grossly excessive nature of the penalty imposed on the appellant might be cited in the laws of California, but these will suffice. As quite pertinently said by the Supreme Court of the United States in a strictly analogous case:

> "This contrast shows more than different exercises
> " of legislative judgment. It is greater than that. It
> " condemns the sentence in this case as cruel and
> " unusual."
>
> *Weems vs. United States*, 217 U. S., 349, 381.

The case cited involved a sentence to fifteen years' imprisonment for making a

> " false entry in an official record and thus perverting
> " the truth."

We have the certificate of the trial judge, of the district attorney who prosecuted the case, of the judge before whom the assailed testimony was given, of the present district attorney of San Francisco, that the sentence is excessive, and requesting the Governor to pardon appellant under section 1596 of the Penal Code of the State, which provides for a pardon in case of sentence for an unusual term. The Governor, while apparently conceding the right to a pardon, refuses it because appellant declines to accept a parole. Manifestly a State prison parole is no remedy for an excessive sentence nor for a wrong conviction; but, on the contrary, is a perpetuation of both. Then, too, the parole law prescribes onerous and debasing disabilities. The prisoner goes forth on parole still a prisoner and encumbered with the degrading and disgraceful *status* of being a ward of a State prison,

> "to remain while on parole in the legal custody and
> " under the control of the State board of prison di-
> " rectors, and subject, at any time, to be taken back
> " within the enclosure of said prison" (Statutes of California, A. D. 1913, p. 1048).

It is liberty without freedom, and subject to the capricious will or pleasure of the prison authorities, without control, restraint or supervision.

The prisoner on parole is a sort of *villein regardant* of the State prison. His compulsory disabilities make impossible the benefits and advantages of freedom or individual independence, indispensable to the achievement of commendable success in life. He is not *sui juris*, but holds his *quasi* liberty at the arbitrary will of another. He cannot assume any of the higher responsibilities of life, nor venture upon any important business enterprise, for he is in constant danger of being remanded to prison. At its best, the system of parole, with its constant police surveillance and espionage, is well adapted to the government and discipline of the criminal class; but no man who is not of that tribe and who has any self-respect will accept a prison parole or subject himself to its debasing consequences. The appellant acted strictly within his rights in refusing the proffered parole. There is no dispute anywhere on the contention of appellant that both the sentence and the imprisonment endured are grossly excessive; being grossly excessive, is it *due process of law* if an excess of jurisdiction because void by express provision of the Constitution of California, in prohibiting cruel or unusual punishment?

Manifestly if the excessive sentence and the imprisonment endured are void for that reason, it clearly is an excess of jurisdiction on the part of the court imposing it; therefore, it is not the *due process of law* required by the Fourteenth Amendment of the Constitution of the United States. It would be absurd to say that what the law declares illegal and void is *due process of law*, though prohibited and void. The court in California derives its existence and jurisdiction from the Constitution of the State; and the Constitution of the State has placed upon that jurisdiction the limitation that in criminal cases the sentence must not be grossly excessive. Any judicial act in excess of the court's jurisdiction resulting in deprivation of liberty is

a violation of the requirement in the Fourteenth Amendment, that there must be *due process of law,* as an essential prerequisite to lawful imprisonment.

2 Willoughby on Constitution, p. 858.
McGehee on Due Process of Law, 1, 58.

"No judgment of a court is due process of law if " rendered without jurisdiction in the court."
Scott vs. McNeal, 154 U. S., 34, 46.
Windsor vs. McVeigh, 93 U. S., 274.

"Though the court may possess jurisdiction of a " cause, and of the subject-matter, and of the parties, " it is still limited in its modes of procedure and in " the extent and character of its judgment. It must " act judicially in all things, and cannot transcend " the power conferred by law."
Windsor vs. McVeigh, 93 U. S., 274.
In re Graham, 138 U. S., 461.
In re Bonner, 151 U. S., 256.

Whether the sentence or the imprisonment endured is illegal according to the law of the State or illegal because in violation of the Constitution of the United States, it is for that very reason an unlawful obstruction to and invasion of the *treaty right* to return to the country granting the extradition, the extradition case having been dismissed. The proper remedy is *habeas corpus* from the United States District Court, as repeatedly held in cases of international extradition pursuant to treaty. Is, then, a grossly excessive sentence to a long term in a State prison, a cruel and unusual punishment within the meaning of section six of article one of the Constitution of the State of California? The provision is as follows, viz:

"Excessive bail shall not be required, nor excessive " fines imposed; nor shall cruel or unusual punish- " ment be inflicted."

It is now the law that this constitutional inhibition makes null and void all grossly excessive sentences to long terms in a State prison, whether they are authorized by statute or not.

Weems vs. United States, 217 U. S., 349, 371, 381.

Say the court:

> "The inhibition was directed not only against pun-
> " ishments which inflict torture, but against all pun-
> " ishments which, by their excessive length or sever-
> " ity, are greatly disproportionate to the offense
> " charged. The whole inhibition is against that
> " which is excessive in the bail required or fine im-
> " posed, or punishment inflicted."
>
> *Weems vs. United States,* 217 U. S., 349, 371.

It follows from this manifestly correct and humane interpretation of the law that the sentence against appellant and the imprisonment endured, being grossly excessive as tested by the facts pleaded in the complaint appearing in the record on this appeal, is *per se* in violation of the provision of the State Constitution inhibiting cruel or unusual punishments; it is therefore void, and being void, it is an unlawful interference with and obstruction to the *treaty right* of appellant to return to the country granting his extradition, the extradition case having been dismissed on motion of the prosecution.

Aside from this point, and as already indicated, the sentence and imprisonment are also a deprivation of liberty without *due process of law,* contrary to the Fourteenth Amendment of the Constitution of the United States, in that the sentence and imprisonment endured, to the extent they are grossly excessive, are beyond the jurisdiction of the court both for the reason they are prohibited by the State Constitution and also by section one hundred and twenty-six of the Penal Code of the State, the latter denying all power to the court, to impose the maximum sentence of fourteen years' imprisonment, where the minimum sentence

of one year is alone applicable to the case. Either this is the correct construction of the statute or it is unconstitutional and void in authorizing the maximum penalty where only the minimum is pertinent to the facts; the classification would in that event be necessarily arbitrary and prohibited by the Fourteenth Amendment. An excessive sentence is *per se* an excess of jurisdiction. *Brown on Jurisdiction* (2d ed.), p. 348. Therefore and according to the authorities heretofore cited in this brief upon the subject, it is not *due process of law;* this must be so, for an excessive sentence to the extent it is excessive presupposes the absence of "due process of law."

In California there can be no valid sentence in a criminal case unless it is sustained by valid statutory authority (Penal Code, sec. 6); but there can be no such thing possible as valid statutory authority for a grossly excessive sentence. Such a statute would be unconstitutional and void. In the *Devonshire case* it was held that an excessive sentence is void because—

> "It is against Magna Charta, the common right of "the subject, and the law of the land."
> *Rex vs. Devonshire,* 11 How. St. Trials, 1354.

Now the phrase "due process of law," as used in the Fourteenth Amendment, means the same thing as "the law of the land."

> *Murray vs. Hoboken,* 18 How., 276.
> *Twining vs. New Jersey,* 211 U. S., 78.

So, too, as fully shown in this brief, a grossly excessive sentence to a long term in a State prison is a cruel and unusual punishment prohibited by the State Constitution. It is also, and for the special reasons heretofore given, prohibited by the statute, to wit, that the statute prohibits the maximum sentence of fourteen years' imprisonment where only the minimum sentence of one year is applicable to the offense as measured and limited by the facts or circumstances of the particular case. It results the State court had no jurisdic-

tion to impose the sentence; therefore to the extent the sentence is grossly excessive, it is a deprivation of liberty without *due process of law* and a denial of the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States. It is impossible to predicate "due process of law" of anything the law denounces as illegal, such, for instance, a grossly excessive sentence. The appellant having served the valid portion of the sentence, if any part of it is valid, is now imprisoned in the State prison of California, in violation of the Fourteenth Amendment, in the particulars pointed out in this brief and in the complaint appearing in the record on this appeal. So, too, the imprisonment is an unlawful obstruction to, and invasion of, his *treaty right* of return to the country granting the extradition. It follows he is legally entitled to the writ of *habeas corpus* from the United States District Court in maintenance and vindication of the legal rights granted him by the *treaty*, the supreme law of the land. And having first fully exhausted all remedies in the State courts, and without avail, he is now entitled to the writ on all the constitutional questions raised by the various other points presented, especially as the State courts failed and refused to pass upon any of the Federal questions, and thus made it impossible for him to sue out a writ of error.

In respect to the point that a grossly excessive sentence is a denial of the equal protection of the laws of California, because in similar circumstances the State courts do not impose a sentence of more than one year's imprisonment, the proposition of law urged by appellant is amply sustained by authority.

Yick Wo vs. Hopkins, 118 U. S., 367.
Barbier vs. Connolly, 113 U. S., 367.

The *Yick Wo case* also sustains the point that, on the constitutional questions presented, we have the legal right to the writ of *habeas corpus* from the United States District Court. The point made with reference to the application

of the Eighth Amendment of the Constitution of the United States to the case is, we think, sufficiently explained in the fifth paragraph of the complaint appearing in the record on this appeal, and need not be repeated here. The same suggestion is proper with reference to the point urged concerning the application of the Thirteenth Amendment of the Constitution of the United States, and likewise covers the point relative to the exclusive jurisdiction of the United States District Court in perjury committed in cases of Federal extradition pursuant to treaty. These and all the other points raised in the complaint or petition for *habeas corpus*, and not discussed at length in this brief, are, we think, sufficiently presented in the complaint and require no further elaboration.

XIX.

Decision on Former Appeal.

The opinion of the court on the former appeal is, in the main, directed to the proposition that an extradited defendant may be prosecuted and convicted on a subsequent charge of subsequent offense without first affording him an opportunity to return to the country granting the extradition. Our contention there presented was, that international law required a new extradition to the end that the asylum reserved to the accused as an essential condition of the previous extradition, be protected from false and unfounded charges of subsequent offenses. Suppose the accused was acquitted on the subsequent charge, his treaty right to return has been violated and no redress is possible; or suppose he was convicted on insufficient evidence or on evidence failing to establish even probable cause for the accusation, the treaty right of return is certainly violated in such a case, and there is no redress. For these reasons and to protect the reserved right of asylum, all writers on international law concur in the view that a *new* extradition is necessary. To

guard against this requirement of international law, most all of the extradition treaties made by Great Britain contain an express provision that the exemption from prosecution on charges other than those specified in the particular extradition shall not extend to subsequent offenses. There is no such provision in the extradition treaty with the United States, and, therefore, it was supposed that the principle of international law applied to the case; but the court held to the contrary and construed the treaty to mean the same thing as if it contained an express provision excluding subsequent offenses from the exemption. Somethng is said in the opinion about the absurdity of two nations entering into a treaty providing that a person *guilty* of subsequent crime should not be prosecuted thereon until he first was given an opportunity to return to the country granting the prior extradition. Although this is what was solemnly done in respect to offenses preceding the extradition, yet we agree that no nation would enter into a treaty providing for immunity or exemption to persons *guilty* of subsequent offenses; but it would be different if they were not guilty. In that case they would be entitled to return. International law, like the common law, assumes *prima facie* they are not guilty (all criminal procedure is primarily intended for the protection of the innocent), and, therefore, requires a *new* extradition, and in that behalf the necessary evidence of criminality to justify the further modification of the reserved right of asylum, incidental to and inseparable from the prior extradition. We are speaking of the well-settled principles of international law, upon the subject. With all due respect to the learned court deciding the prior appeal, we insist there is nothing absurd in these principles; on the contrary, they are strongly sustained by reason and justice; of course we do not contend that lawyers educated in the common law are expected to be very familiar with them; nor with the reasons upon which they are founded. Experience does not justify any such expectation. Like Lord Coke, they

would prefer the common law; their habit of mind is set in that direction; and yet the common law is strongly antagonistic to extradition.

We respectfully insist we are not correctly represented in the opinion on the former appeal, when it is asserted we contended that the same absolute immunity and exemption existing as to prior offenses applied to subsequent offenses. We never at any time made any such an absurd contention. On the contrary, we always maintained that subsequent offenses could legally be prosecuted, but that according to the well-established principle of international law upon the point, a *new* extradition is required; and that this is necessary to protect the reserved right of asylum from fraudulent evasion and false charges of subsequent offenses. The authorities cited in appellant's brief on the former appeal fully sustain our contention; but no reference is made to them either in the opinion or in the official report of the case, itself a persuasive circumstance showing that the court misapprehended the point urged. However, the question is not again raised on this appeal unless the court *sua sponte* desires to review the point; but we do insist there is an *extradition jurisdiction* vested exclusively in the United States by the Constitution; that this jurisdiction extends over the person of the accused, *in custodia legis*, from the moment the Federal Government receives him under the international warrant of extradition until his final discharge for or on account of the offense or offenses specified in the warrant; so reads the statute; that, therefore, the prosecuting State cannot acquire the requisite and essential jurisdiction over his person, to sustain a subsequent prosecution for a subsequent offense, while the extradition case is pending and undetermined. That to permit this would be to permit an illegal interference with the functions and obligations devolving on the United States by the treaty, the international warrant of extradition and sections 5275, 5276, and 5277 of the Revised Statutes of the United States; and would also be an invasion of the exclusive authority conferred on

the Federal Government by the Constitution over the entire subject of international extradition pursuant to treaty. The points are quite fully discussed in this brief and the authorities cited. Now the decision on the former appeal does not respond to this proposition of exclusive extradition jurisdiction vested in the Federal Government over the person of the accused, in enforcement of both the treaty and the statute, but assuming without deciding that the extradition jurisdiction over the accused has ended, possibly on the untenable theory that it *ipso facto* terminates when he sets foot on the territory of the prosecuting State, the court reduces the contention to a very simple proposition of the right of the prosecuting State to determine which of two or more criminal accusations pending in its courts against the same person it will first bring to trial. In other words, the entire question is considered to be merely a matter of local or municipal criminal law; but this is by no means deciding the question raised as to the extradition jurisdiction vested exclusively in the Federal Government over the person of the accused and prior both in point of time and right to the local or municipal authority of the prosecuting State on the subsequent charge of subsequent offense. The question is not, as quite erroneously supposed by Mr. Justice Peckham in the opinion on the former appeal, as to the mere exercise of a procedural right of preference in the matter of trial, *but it is a question of Federal jurisdiction,* as this brief very fully demonstrates. And as a question of Federal jurisdiction, the court on the former appeal makes no attempt whatever to decide it. Had the court overruled the point, we certainly would now respectfully insist that both upon principle and precedent the decision would be indefensible, and should therefore, be corrected and modified in conformity with law.

2 Sutherland Stat. Constr., p. 903.
Hart vs. Burnett, 15 Cal., 530.
Alferitz vs. Borgwardt, 126 Cal., 201.
1 Willoughby on Constitution, p. 52.

The extradition jurisdiction over the person of the accused, only ending when the extradition case is finally terminated, is a jurisdiction vested in the United States to the exclusion of the prosecuting State, and to the exclusion of all local or municipal jurisdiction belonging to the prosecuting State. The latter can only lawfully exert the authority of its criminal code to the extent necessary in furtherance of the extradition, and of the obligations imposed by the *treaty*, the supreme law of the land; in other words, can only act in furtherance of the extradition jurisdiction, and not at variance or in conflict with it, nor independently of it. When the Federal jurisdiction is ended, then, but not until then, the prosecuting State may proceed in the exercise of its local or municipal authority and prosecute the accused on a subsequent charge of subsequent offense. It can very readily accomplish this and expedite matters, when proper or lawful, by first dismissing the extradition case or by entering a *nolle prosequi*. This will necessarily terminate the extradition jurisdiction and the incidental *custodia legis* of the Federal Government, over the person of the accused, existing by virtue of the international warrant of extradition, and the obligations enjoined both by the treaty and the statute. The safe custody that the latter requires to be maintained by the United States over the person of the accused, until the final termination of the extradition case, will then end, and the subordinate State may proceed with the prosecution of the subsequent charge of subsequent offense, and need not afford the accused the opportunity of first returning to the country whence he was extradited, taking as law the doctrine of the prior appeal. In that event only is it true, as suggested in the decision on the former appeal, that the case is no longer a matter of any interest to the surrendering government; and we may add, neither can it be a matter of any interest to the United States, the extradition jurisdiction having finally terminated in the discharge of the accused. Until then, however, it was a matter of most

important concern to both governments that the *treaty* obligations be fully performed and satisfied, and this by the Government of the United States. It was also a matter of especial importance to the latter that the safe custody of the accused provided for in section 5275 of the Revised Statutes be fully maintained by Federal authority until the final termination of the extradition case, as explicitly required by that statute. The prosecuting State cannot acquire any custody whatever of the accused, in the meantime, except in subordination to and in furtherance of the extradition jurisdiction held by the United States exclusively in virtue of the Constitution, and the prohibition of all power to the several States, over the subject. We have yet to learn, and every lawyer versed in the elementary principles of jurisprudence has yet to learn, that a person or thing held in *custodia legis* by one government can be seized or taken by another government in the exercise of a different and independent jurisdiction.

Say the Supreme Court:

> "It is a principle of universal jurisprudence that
> " where jurisdiction has attached to a person or thing
> " it is (unless there is some provision to the contrary)
> " exclusive in effect until it has wrought its func-
> " tion."
>
> *Taylor vs. Taintor,* 16 Wall., 370.

The jurisdiction held by the United States over the accused is not the municipal jurisdiction of the prosecuting State, but the paramount and exclusivev authority of the National Government.

In addition to this very elementary principle, we have the well-settled doctrine of constitutional law that the jurisdiction and authority of the United States over the entire subject of international extradition pursuant to treaty, is exclusive of the several States, and that they have no reserved right to the custody of the accused, for a purpose at variance with the extradition, while the extradition case is pending

and undetermined. We want to point out emphatically and distinctly that no decision to the contrary was made on the former appeal, and could not have been made without holding that there is no *custodia legis* and no extradition jurisdiction vested in the United States over the person of the accused in virtue of the international warrant of extradition, and no obligations enjoined by the treaty upon the Federal Government, and that the provisions of sections 5275, 5276, and 5277 of the Revised Statutes are unconstitutional and void because an attempt to interfere with the administration by the State of its essentially local or municipal criminal laws; and further that there is no authority vested exclusively in the United States over the subject of international extradition pursuant to treaty, but that the Federal Government merely acts as the police agent of the subordinate State in capturing the accused that he might be subjected to the local criminal process entirely free from restrictions of the extradition.

Of course we fully understand that extradition is simply a means to an end, but this proposition can in no degree militate against the existence and supremacy of the extradition jurisdiction conferred exclusively upon the United States, over the person of the accused, by the Constitution, the treaty, and the statute, extending from the time he is received by the Federal Government, under the international warrant of extradition, to the final termination of the case. This extradition jurisdiction cannot be abdicated, renounced, nor delegated by the United States to the prosecuting State. Nor can the United States transfer the custody of the accused to the latter for the purpose of his trial upon a subsequent charge of subsequent offense. This, the Constitution, the treaty, and the statute alike prohibit, while the extradition case is pending and undetermined. The Federal Government has certain high obligations enjoined on it by the law of the extradition; the performance of these obligations cannot be transferred to the prosecuting State. The maintenance of the extradition jurisdiction vested in the United

States exclusively, by the Constitution, the treaty, and the statute, is essential to their proper and complete performance, especially as the responsibility to the foreign nation for their full and adequate performance is with the Federal Government, and not the prosecuting State. True, the trial and its conclusion are to be in the State court and according to the municipal law of the local jurisdiction, but this does not operate a merger or destruction of the extradition jurisdiction held by the United States over the person of the accused; it still remains exclusive, independent, supreme, and distinctively Federal in enforcement of the treaty, the Constitution, and the statute. The prosecuting State must act, if it acts at all, in furtherance of and not at variance with this extradition jurisdiction held by the United States *in custodia legis* of the person of the accused for the one paramount purpose of performing the high obligations imposed by the treaty and the statute.

Clearly, two different governments cannot have control of the accused at the same time for different purposes; so it must follow, not only that the jurisdiction first vesting is paramount and exclusive, but that the government vested with sole and exclusive authority over the subject is the one having the exclusive right to the *custodia legis*. We challenge the production of a single case where it has been held that an exclusive authority conferred by the Constitution on the United States, upon a given subject, does not absolutely and effectually prevent any one of the several States from exercising any jurisdiction whatever at variance with that conferred on the Federal Government, whether it be in actual conflict or not. Take the familiar subject of regulation of interstate or foreign commerce in cases where the authority of the Federal Government is exclusive. Is it supposable that the several States can legislate on the subject in the absence of Federal regulation? Of course not. Why, then, is not the same principle applicable to international extradition pursuant to *treaty*, where the United States has *ex concessi* exclusive jurisdiction over the person of the accused

until the final termination of the case in his conviction, acquittal, or discharge on a *nolle prosequi?* Where is there any provision in the law of the extradition or in any other law, express or implied, or any doctrine of Federal jurisprudence, which permits the United States to deliver over the custody of the accused to the prosecuting State, not for trial on the extradition charge, but for trial on a subsequent charge of subsequent offense, to the utter abolition of the extradition jurisdiction? Would not this be a flagrant case of abdicating and renouncing the Federal authority over the accused as conferred by the international warrant, and repudiating the high obligations imposed by the treaty, the statute, and the Constitution, on the Federal Government? The United States never surrendered the appellant to the State of California, for trial on the second perjury charge, and manifestly would have no lawful right or authority to do so while the extradition case was pending and undetermined. Had he been delivered to the State by the Federal Government, for trial to a final conclusion of the extradition case, remaining, of course, constructively, at least, in Federal *custodia legis,* pursuant to the law of the extradition, the State could not use his extradition custody for an altogether different purpose than the one prescribed by the treaty, *at least until after the final termination of the case.* To do so would clearly be a fraudulent diversion of his entrusted custody to a purpose prohibited by the paramount law of the extradition, and the State would be without power or jurisdiction to accomplish it.

Résumé.

In conclusion, we respectfully submit that the appellant is entitled in legal right to the writ of *habeas corpus* from the United States District Court, upon the facts averred in the complaint or petition appearing in the record, and on each of the following grounds, viz: 1. That in the arbitrary deprivation of a perfectly valid and legally conclusive defense

to the accusation— a defense going to the merits and establishing in law the absolute innocence of the appellant of the crime charged—he was thereby denied the right to *due process of law,* and the equal protection of the law, guaranteed him by the Fourteenth Amendment of the Constitution of the United States. 2. That in being deprived of his liberty under a so-called judgment of a "court" that is not a legally constituted tribunal or legally established court of judicature of the State of California, and one that had no jurisdiction over the person or subject-matter, is a denial of the *due process of law* and of the equal protection of the law guaranteed appellant by the Fourteenth Amendment of the Constitution of the United States. 3. That to infuse legal vitality into such a tribunal by means of a subsequent amendment to the Constitution of the State is an *ex post facto* law, prohibited by section ten of article one of the Constitution of the United States, and is also a denial of the *due process of law* guaranteed the appellant by the Fourteenth Amendment. 4. That the trial, conviction, sentence, and imprisonment of appellant are in violation of the paramount law of the extradition, and of the extradition jurisdiction over his person, vested by the Constitution, the treaty, and the statute exclusively in the United States, and extending from the moment of the delivery of his custody to the Federal Government, under the international warrant of extradition, to the final termination of the extradition case in his conviction, acquittal, or discharge on a *nolle prosequi.* 5. That the sentence and the statute authorizing it are in violation of the Fourteenth Amendment of the Constitution of the United States and void, because a denial of the due process of law and of the equal protection of the laws of the State, in the particulars pointed out in this brief and in the complaint or petition appearing in the record. That the imprisonment is in violation of the Thirteenth Amendment of the Constitution of the United States, and also in violation of the Eighth Amendment, in the particulars and for the reasons stated in the complaint. It is also in violation

of the exclusive jurisdiction of the United States District Court, over the offense charged, in the particulars and for the reasons stated in the complaint. 6. That the sentence because grossly excessive, is a deprivation of the *due process of law* and of the equal protection of the law guaranteed appellant by the Fourteenth Amendment of the Constitution of the United States, on the grounds and for the reasons fully presented in this brief. 7. That the sentence because grossly excessive is in violation of section six of article one of the Constitution of California; therefore, the imprisonment is illegal. That whether the imprisonment is illegal because in violation of the law of California or illegal because in violation of the Constitution or laws of the United States on the grounds specified in the complaint and in this brief, it is for that reason an unlawful obstruction to and invasion of the *treaty right* of return to the country granting the extradition; therefore, the appellant is entitled in legal right to the writ of *habeas corpus* from the United States District Court, to the end that the unlawful obstruction be removed, and the treaty right be made available.

It follows that for each of these many reasons the judgment appealed from should be reversed, with suitable directions to the United States District Court for the hearing of the case, and the discharge of the prisoner, as thereunto required by law.

Respectfully submitted,

GEORGE D. COLLINS,
Counsel for Appellant.

Dated at Washington, in the District of Columbia, October term, A. D. 1914.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States, and to the Court.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 594.

GEORGE D. COLLINS, APPELLANT,

v.

JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, ETC., APPELLEE.

APPELLANT'S SUPPLEMENTAL BRIEF AND ARGUMENT.

GEORGE D. COLLINS,
Counsel for Appellant.

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PREFACE.

This supplemental brief and argument are submitted in the confident expectation that the important points therein given a further discussion will the more clearly and impressively convey to the court the convincing and conclusive reasons urged by appellant in support of the prayer for reversal of the judgment from which the appeal is taken. We have in this brief corrected the error made in the first brief in the imperfect copying of section sixty-one of the Civil Code of California, and have requested the clerk to make the correction in the brief heretofore filed.

The appellant was convicted after an exceedingly unfair and illegal trial—destructive of every opportunity to establish his innocence of committing perjury in denying a marriage, a legal and valid marriage, with the prosecutrix. He was arbitrarily refused by the State courts—certainly by the "trial court"—all opportunity to show in his defense that his denial of the marriage was and is the absolute truth, and no perjury. Either this, or he was convicted of perjury in denying that the prosecutrix was a party to a certain marriage ceremony, and arbitrarily denied by the State courts all opportunity to show in his defense that the ceremony was *void* by statute were she a party to it. The arbitrary rejection of the defense by the "trial court"; the arbitrary denial of the opportunity to be heard in his own defense on a point establishing in law his innocence of the charge upon which he stands convicted; the arbitrary striking out of such a defense is manifestly depriving the appellant of the *due process of law* guaranteed him by the Fourteenth Amendment of the Constitution of the United States.

We make the point that the constitutional right to be heard before one can be lawfully condemned is the right to be heard upon a legally sufficient defense to the accusation,

and therein the right to interpose and maintain such a defense.

We have thus in this preface specially adverted to the rejected defense (of course without disparagement to the many other points we urge in support of our appeal), because it is a point that extends farther into the merits of the case—indeed, of both perjury cases and the rest of the monstrous litigation—than does any one of the other points presented, in showing that the appellant is innocent of crime and should have been acquitted instead of convicted. Justice and law denounce the result and the method by which it was procured.

GEORGE D. COLLINS,
Counsel for Appellant.

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JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, ETC., APPELLEE.

APPELLANT'S SUPPLEMENTAL BRIEF AND ARGUMENT.

The Facts.

The facts of the case are to be taken as alleged in the complaint or petition for *habeas corpus* precisely and to the same extent as if they had been fully and conclusively established by competent proofs. This very elementary proposition of law applies to every fact alleged, including the fact concerning the limitation prescribed by the extradition law of Canada. It is well settled that the law of a foreign country is a question of fact and to be pleaded as such. The appellant contends that the averments of fact set forth in the complaint or petition for *habeas corpus* present in law a case entitling him to the writ from the United States District Court and to his discharge from imprisonment. The case must be taken exactly as though the court had sus-

tained a general demurrer to the complaint or petition. The facts averred are deemed admitted for the purpose of the demurrer, and the question is entirely one of law, to wit: Whether, on the facts pleaded, the appellant is entitled to be restored to his liberty upon a writ of *habeas corpus* from the District Court of the United States? In other words, does the complaint or petition for the writ make out a *prima facie* case showing that the imprisonment is in violation of the Constitution, treaty, and laws of the United States in the particulars specified, and does it also show that the proper remedy is *habeas corpus* from the United States District Court, or that it is incumbent on the court to grant the writ and discharge the prisoner, taking the facts of the case to be conclusively established in accordance with the averments of the petition, for it is to be considered that the appellant is prepared to prove by satisfactory and convincing evidence every fact set forth in the petition, and is simply seeking the opportunity to obtain the necessary judicial hearing for the purpose; and this upon the contention that in his petition he has made out a *prima facie* case for relief from the District Court of the United States entitling him in law to the writ of *habeas corpus* and his restoration to liberty. Upon the issuance of the writ and the coming in of the return he will have the opportunity he seeks, to prove by sufficient evidence whatever facts may be disputed. The case will then be determined upon its merits. The appellant insists and maintains that he has the legal right to a decision on the merits, having presented a *prima facie* case in his petition. On the other hand, the lower court held that the petition did not make out a *prima facie* case, and for that reason refused to grant a hearing on the merits. We contend this ruling is erroneous, and that the judgment should therefore be reversed.

There were a number of errors and omissions in the transcript of the record, including an error in the appeal itself (Record, p. 24). All these mistakes were due to clerical misprisions; on stipulation of counsel, as well as certificate

of the clerk of the lower court, now on file, they have been duly corrected, thus dispensing with the need of recourse to *certiorari*.

II.

Arbitrary Rejection of Defense.

Appellant was indicted and convicted on a charge of perjury in testifying that a certain marriage ceremony, confessedly *void by statute*, was not with the prosecutrix. This testimony denying that the prosecutrix was a party to the void marriage ceremony was given in a case where the cause of action depended entirely on the existence of a legal and valid marriage with her. On the trial of the action wherein the conviction was obtained the appellant, as the defendant therein, interposed the perfectly conclusive defense, that conceding it to be the fact as maintained by the prosecution, that the prosecutrix was a party to the marriage ceremony, and therefore that the testimony to the contrary was false, that still the ceremony was absolutely void by section sixty-one of the Civil Code of California; and, being void, false testimony as to the parties participant would not be perjury, especially when given in a case where only a legal and valid marriage would suffice to sustain the cause of action. Upon objection by the prosecution that they conceded this to be the law of California (Record, p. 5), but that they were not then contending the ceremony constituted a legal or valid marriage with the prosecutrix, the "trial court" sustained the objection and ruled out the defense (Record, p. 5), despite appellant's insistence that he was thereby denied a legally sufficient and conclusive defense to the accusation, in law establishing his innocence, and that consequently the ruling deprived him of the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States (Rec., pp. 5, 6). The "trial court" overruled the point and rejected the defense; also the proofs sustaining it. The rejection was not made on

any theory that the defense was not the law of California; on the contrary, it was conceded to be the law (Record, p. 5); but because it was necessarily predicated on the fact that the disputed ceremony, if with the prosecutrix, was void as a marriage, and so declared by statute, the "trial court" held the defense was not admissible, forsooth the prosecution did not contend that the ceremony constituted a valid or legal or any marriage with the prosecutrix. In other words, the appellant was held precluded or estopped from making the defense by reason of the assertion of the prosecution that they did not contend the ceremony was a legal marriage with the prosecutrix, and thus the very fact on the basis of which the defense was in law sustainable constituted the pretext for the ruling rejecting it. Such a ruling is essentially arbitrary and the result of it is to deprive the appellant of a legally conclusive defense to the accusation—a defense going to the merits and in law establishing his innocence on the charge made against him. The interposed defense is and always has been the law of California and of every State in the United States; of this the Supreme Court will take judicial notice. Testimony concerning the one point as to the identity of the parties participant in a marriage ceremony expressly declared void *ab initio* by statute cannot, if false, be made the valid or competent basis of a charge of perjury, especially when given in a case where only a legal marriage would sustain the cause of action there presented.

2 Whart. Crim. Law, sec. 1282, 10th ed.; secs. 1520, 1541, 1546 of 11th ed.

Rex vs. Dunston, 1 Ryan & M., 109, per Abbott, C. J.

King vs. Benesch, Peake's N. P. 93, per Kenyon, *J.*

Crump vs. Com., 75 Va., 922, 923.

Not only has this always been the law of California, but no court of the State has ever ruled to the contrary.

The common-law marriage with Agnes Newman (Rec., pp. 4, 7) was perfectly valid.

Sharon vs. Sharon, 75 Cal., 9.
Kilburn vs. Kilburn, 89 Cal., 50.
Sharon vs. Sharon, 79 Cal., 670.
People vs. Beevers, 99 Cal., 286.

The question is entirely and absolutely juristic—not canonistic or ecclesiastical.

It is provided in section 7 of article 20 of the Constitution of California, that "no contract of marriage, if " otherwise duly made, shall be invalidated for want of con- " formity to the requirements of any religious sect."

Nor has this perfectly valid and pre-existing common-law marriage ever been disputed or questioned, nor the testimony establishing it been made the basis of or ever involved in a charge of perjury. It is this marriage, perfectly valid and undisputed, that renders void the subsequent ceremony of May 15, 1889, if with the prosecutrix, for such is declared the law of the State by section sixty-one of the Civil Code, providing in terms plain and unmistakable, that "a subsequqent marriage contracted by any " person during the life of a former husand or wife of such " person, with any person other than such former husband " of wife, is illegal and void from the beginning, unless the " former marriage had been annulled or dissolved." To deny, therefore, in testimony given in the trial of the extradition case, that the prosecutrix was a party to the admittedly void marriage ceremony of May 15, 1889, would not, if false, be perjury. This is the defense interposed by appellant on the trial of the second perjury indictment, and rejected by the court, upon the ground that the prosecution did not contend that the ceremony constituted a legal marriage with her; yet obviously this is the very ground on which the interposed defense should have been received and sustained, as held by the authorities above cited.

Whether in a State court a given series of facts do or do not constitute a legal defense is not ordinarily a Federal question; but the arbitrary rejection of what the undisputed and clearly established law of the State makes a perfectly

valid and legally sufficient defense to a criminal accusation, a defense that goes to the merits and in law renders the accused innocent of the charge laid in the indictment, is the deprivation of the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States. And so hold the authorities cited at pages 36 *et seq.* of appellant's brief heretofore filed.

We repeat, that in the case of appellant the rejection of the interposed defense did not proceed on any theory that it was in conflict with the law of the State (Record, p. 5); but, on the contrary, the defense presented was conceded to be the law (Record, p. 5), and rejected because the basic fact on which it is legally predicated is not controverted by the prosecution. Obviously, this asserted reason for the ruling of the "trial court," instead of being any ground for the rejection of the defense, is the very reason why it should have been received and sustained. According to the views of the "trial court," all the prosecution need do to insure the rejection of a perfectly valid and legally sufficient defense to a criminal accusation is to concede the facts on which it is based; *by doing this the defense is eliminated, and the conceded facts go with it.* Whether a certain interposed defense is or is not a defense in a given case does not depend on the arbitrary decision of the court, but on the law of the State, and if the law of the State makes it a defense, its *arbitrary* rejection is a denial of constitutional right to due process of law. On this point and in support of it all the authorities concur. (See appellant's brief, pages 36 *et seq.*) According to the incontrovertible law of the State of California, the rejected defense was legally conclusive. Now what were the facts?

First, as to the fundamental fact:

There can be but one of two hypotheses possible: either appellant was convicted of perjury in denying a marriage with the prosecutrix or of perjury in denying that she were a party to a ceremony the statute declared void as a marriage, if she were in fact a party to it. If the first-stated conclusion be the correct one, then clearly the defendant was entitled to

the legal defense that the marriage was void *ab initio* by express terms of the statute; for, if void, his denial of the marriage was the absolute truth and no perjury. If, on the other hand, he was convicted of perjury in denying she were a party to a ceremony the statute declared *void* as a marriage, he was manifestly entitled in legal right to the conclusive defense that testimony to what is in law a *nullity* cannot, if false, be made the competent or valid basis of a charge of perjury, especially if given in a case where only a legal and valid marriage would sustain the cause of action presented for decision. And, as we have pointed out, if the charge were perjury in false testimony to facts showing or tending to show the marriage void, he still would be entitled to the defense that the marriage was void and declared void by express terms of the statute. In any one of these three cases the rejection of the defense would necessarily be arbitrary and the deprivation of *the due process of law* guaranteed by the Fourteenth Amendment to the Constitution of the United States. (See authorities cited on page 36 *et seq.*, appellant's brief, heretofore filed on this appeal.) However, it must be borne in mind that appellant is not and never has been accused of perjury in that portion of his testimony in the trial of the extradition case showing the marriage void—an important point repeatedly referred to in appellant's brief. The charge as laid in the indictment on which the conviction rests is that of perjury in denying that the prosecutrix was a party to a marriage ceremony not alleged to constitute a legal or valid marriage—a ceremony that *non constat* is void as a marriage. Manifestly, false testimony that the prosecutrix was not a party to an undisputed void marriage ceremony could not possibly be of any, even the slightest, relevancy in the extradition case, where only a legal and valid marriage would sustain the charge there made. Whether the marriage was void, would be a legal basis for a charge of perjury in false testimony addressed to that issue; but no such charge was ever made nor attempted against the appellant. Testimony as to whether the prosecutrix were a party to a marriage ceremony, valid as a legal marriage, would be very relevant and material in the trial of

the extradition case, and, if false, would constitute perjury; but not whether she were a party to an undisputed void marriage ceremony expressly declared void by statute. As repeatedly pointed out by appellant, we apprehend with unnecessary reiteration, it would be different if the charge in the case where the conviction was obtained were perjury in testifying to facts showing or tending to show the ceremony of May 15, 1889, to be void as a marriage with the prosecutrix. Either the indictment in the case where the conviction was obtained does or it does not charge that the ceremony of May 15, 1889, constituted a valid and legal marriage with the prosecutrix. In either event the defendant was entitled in legal right to interpose and maintain the conclusive defense the "trial court" arbitrarily rejected on grounds the law required that the defense be received and sustained. False testimony as to the irrelevant point concerning merely the question of identity of the parties participant in an undisputed nullity is no perjury in a case where only a valid and legal *status* or right will sustain or tend to sustain the cause of action, but false testimony to facts establishing or tending to establish a nullity would, in such a case, constitute perjury. In either instance it would be a perfectly good and legally conclusive defense that the *status* or right constituting the basis of the charge or claim in the case where the testimony was given had no validity in law, but was a *nullity,* and so declared by statute. (See authorities cited on pages 15 and 39 *et seq.* of appellant's brief heretofore filed on this appeal.)

The appellant was not convicted of perjury in denying the existence of a legal and valid marriage (Rec., p. 5), but of perjury in denying that the prosecutrix was a party to an undisputed void marriage ceremony; and, as held by all the authorities on the point, this could not constitute perjury in the extradition case, where the accusation rested entirely on the averment of a legal and valid marriage. Had the appellant been permitted the legally conclusive defense the "trial court" arbitrarily rejected, the conviction would have been an utter impossibility. Whether the marriage was valid

or void was the determinative question in the trial of the extradition case, *not whether the prosecutrix was a party to a confessedly and undisputed void marriage ceremony,* expressly declared void by section sixty-one of the Civil Code of California.

In any event, it was the legal right of the defendant to show in answer to the second perjury charge, and as a conclusive defense thereto, that the testimony there assigned as perjury related entirely and exclusively to a ceremony the statute declared void *ab initio* as a marriage, and therefore, being an absolute nullity, testimony that the prosecutrix was not a party to it could not, if false, be made the competent or valid basis of a charge of perjury alleged to have been committed in the extradition case. (See authorities cited on pages 15 and 39 *et seq.* of the appellant's brief heretofore filed on this appeal.) The arbitrary rejection of the defense is manifestly a deprivation of the *due process of law* guaranteed the appellant by the Fourteenth Amendment of the Constitution of the United States. (See authorities cited on page 39 *et seq.* of appellant's brief heretofore filed on this appeal.)

Taking the testimony assigned as perjury in the case where the conviction was obtained, and construing it according to its legal value and probative effect as given in the trial of the extradition charge, it simply amounts to this: That there was no legal marriage with the prosecutrix as the result of the ceremony of May 15, 1889. Now, clearly, if by statute that ceremony is declared void as a marriage, were it with the prosecutrix, then the testimony denying a marriage with her would be the absolute truth, and no perjury, and the rejection of the defense would necessarily be arbitrary and a deprivation of *the due process of law* guaranteed the accused by the Fourteenth Amendment of the Constitution of the United States. While no doubt the prosecution aimed to differentiate the second perjury charge from the accusation in the extradition case, by attempting to eliminate the question of marriage, still it is obvious, nevertheless, that there exists a legal identity in the gist of the two charges,

and that consequently the *treaty* prohibits the substitution, as it is manifestly a fraudulent attempt to evade the law and obligations of the extradition, and if sustained would operate to deprive the appellant of the legal rights conferred upon him by the *treaty* and the Federal statute enacted by Congress to enforce the treaty requirements resulting from the extradition. The treaty certainly prohibits all fraudulent evasions and perversions of its authority.

III.

The Law of the Extradition.

On the point that there is an *extradition jurisdiction* vested exclusively in the United States by the Constitution and by the treaty over the person of the accused, and extending from the time the surrender is made by virtue of the international warrant of extradition to the final termination of the case in acquittal, conviction, or dismissal on *nol. pros.*, we desire to present the following suggestions: It surely will be conceded that the entire and complete authority over the subject of extradition according to treaty, is vested by the Constitution exclusively in the United States, and that the several States are consequently denied all jurisdiction over the accused *at variance with the extradition.* It will likewise be conceded, no doubt, that the United States, and not the State of California, is a party to the treaty of extradition; also that the several States are not known to the law in the extradition proceedings; that the extradition is made exclusively on demand of the United States, and granted to the United States, not to the prosecuting State; that the nation granting the extradition looks alone to the United States to carry out and make effectual the sole and only purpose of the extradition in performance of the fundamental requirement of the treaty, and that the responsibility to the foreign country for the proper and *bona fide* fulfillment of this dominant obligation enjoined

upon the United States by the treaty rests primarily and exclusively on the Federal Government, so far as the nation granting the extradition is concerned. It will also doubtless be conceded that the custody of the accused is given by the foreign nation to the United States pursuant to the treaty and by virtue of the international warrant of extradition for the purpose of executing the treaty requirement that he be brought to trial to a final conclusion upon the charge on which he is extradited, unless the same is in good faith dismissed on *nol. pros.* or otherwise legally terminated. And it will be conceded that the warrant of extradition controls the custody of the accused to the exclusion of all local or municipal process of the prosecuting State on any other charge, or even on the same charge, until the final termination of case, and that the warrant runs to the United States, and not to the prosecuting State. Therefore it is perfectly plain that an *extradition jurisdiction* over the person of the accused is vested exclusively in the United States for the special purpose of enforcing the fundamental requirement of the treaty derived by necessary implication from its very nature and province as a practical measure of attaining a specific and definite result. Hence the enactment of section 5275, R. S. U. S., which expressly provides for the safe custody of the accused *by the United States, until the final conclusion of his trial on the extradition charge, or until his final discharge from custody or imprisonment for or on account of such crimes or offenses specified in the extradition warrant;* and this upon the theory derived both from the Constitution and the treaty that the United States is entitled to his custody until then; in other words, that the warrant of extradition does not become *functus officio* until the case is ended by acquittal, conviction, or dismissal on *nol. pros.* He is not brought into the United States nor before the State court on any State process whatever, but entirely by virtue of the international warrant of extradition, which controls his custody until the case is finally terminated, for the purpose of enforcing the fundamental requirement of the treaty. The warrant of extradi-

tion, it has been decided, is not a warrant of arrest, but a warrant of authority for the detention and prosecution of the accused until the case is finally terminated. Without the authority of the warrant the case could not be prosecuted at all; it would be impossible for the State to acquire the requisite jurisdiction. *To use the entrusted custody of the accused for a purpose not authorized by the treaty, while the extradition case is pending and undetermined, is not only an abuse of the high process by virtue of which he is within the territory of the prosecuting State, but it is a plain and manifest violation of the treaty.*

Passing to section 5275, R. S. U. S., we wish to point out that it was said by Mr. Justice Peckham, in a rather sweeping *ipse dixit*, and without any suggestion of reason or semblance of reason for the conclusion, that section 5275, R. S. U. S., was not applicable to the case; he very likely intended to say that it is not applicable to a subsequent charge of subsequent offense, and to this we readily assent: but to say that the statute does not apply to the *extradition case* is to contradict the very terms of the statute; it is, in effect, to abolish the statute.

IV.

Special Authority of United States in Extradition.

Now if, as is clearly the case, the United States holds an extradition jurisdiction over the person of the accused, *in custodia legis*, for the purpose of complying with the *treaty* requirement of trial to a final conclusion of the charge on which he was extradited, subject, of course, to the right of the prosecuting State, to *nol. pros.* the charge, it is manifest the Federal Government would have no authority to surrender him to the prosecuting State for trial on a subsequent charge of subsequent offense, for that would be *at variance with the treaty and the extradition.* For the same reason the prosecuting State would have no power or authority to seize the custody of the accused and

use it for any such purpose while the extradition case is pending and undetermined. It would be in conflict with the treaty. The authority of the prosecuting State is restricted by the supreme law of the land to a procedure strictly in furtherance of the purpose and scope of the extradition, while the case is pending and undetermined, for it can only acquire a competent custody of the accused as a basis of criminal prosecution, from the United States, and the latter has no authority to entrust the custody for any purpose not provided in the treaty. It would be a manifest violation of the treaty to divert the custody to a purpose *at variance with the extradition.* While the extradition case is pending and undetermined, there is a *treaty* obligation resting on the United States to be satisfied; therefore a subsequent prosecution of a subsequent offense would be incompatible with the performance of this high obligation as well as in violation of the good faith pledged by the United States for its due and proper observance. To reduce the treaty to a level with the subordinate authority of the municipal laws of the prosecuting State, so as to permit of an election between pending indictments for purpose of trial, as is done in the opinion of Mr. Justice Peckham, is to abolish the extradition jurisdiction and violate section 2 of article 6 of the Constitution of the United States, making the *treaty* "the supreme law of the land" and requiring that "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The notion that the moment the accused is brought by the United States into the territory of the prosecuting State the laws of the latter supersede the high process of the extradition, and that this process, derived from the treaty for the very purpose of carrying into effect the requirements of the treaty, becomes thereupon *functus officio,* is not only clearly untenable, as demonstrated by the reasoning of the court in the *Rauscher case,* but is manifestly absurd.

SPEAR ON EXTRADITION, pp. 205, 232, and 233.

Yet, disguise it as we may (and we say it with proper deference), the opinion on the former appeal is based upon this very impossible notion in quite a visible effort to reduce the entire supremacy of the law of the extradition to a level with, and indeed make it subordinate to, the criminal law of the prosecuting State; to merge the greater in the lesser, and thus obliterate the authority and limitations of the treaty, wiping out entirely the extradition jurisdiction held by the United States to the exclusion of the several States, over the custody of the accused, for the one purpose of enforcing the requirements of the treaty, and the Federal statute, those implied as well as those expressed.

V.

Extradition Jurisdiction Exclusive.

Let us concede the State may legally prosecute the subsequent charge of subsequent offense without need of first permitting the accused the opportunity of returning to the country granting the previous extradition. The point is that this can only be done after the final termination of the extradition jurisdiction over his person, held by the United States in virtue of the international process issued for the very purpose of enforcing the requirements of the treaty, *which are necessarily coextensive with the pendency of the case.* The prosecuting State may, however, dismiss the case, and will then be in a position to acquire the requisite jurisdiction to sustain a subsequent prosecution for a subsequent offense; but while the extradition case is pending the extradition jurisdiction over the person of the accused is supreme and exclusive, for the reasons heretofore given. The apparent difficulty confronting the court on the prior appeal, and which no doubt induced or impelled the conclusion arrived at, was the asserted claim to a right of return; but we concede on this appeal there is no such right as against a pending prosecution on a subsequent charge of subsequent offense.

VI.

The Correct Rule of Decision.

It is undoubtedly true, as stated by Mr. Justice Peckham, that the *treaty* must determine the question as to the jurisdiction of the prosecuting State to maintain the subsequent prosecution on a charge of subsequent offense; but he is clearly in error when he construes the treaty and its legal effect according to the common-law rules of interpretation, instead of applying the principles of international law to the decision of the question presented. He is also clearly in error when he assumes or asserts that the *treaty* alone disposes of the case. The Constitution and laws of the United States governing the *extradition jurisdiction*, held exclusively by the United States over the person and custody of the accused for the specific purpose of enforcing the requirements of the treaty, are likewise to be considered as furnishing the correct rule of decision. And the only doctrine of the common law that can be deemed relevant to the point raised in respect to the exclusive nature and supreme control assigned to the *extradition jurisdiction and the incidental custodia legis*, is the one mentioned by the Supreme Court of the United States in a case often cited in our brief. The court say:

> "It is a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."
> *Taylor vs. Taintor*, 16 Wall., 370.

Until, therefore, the extradition case was finally terminated by the entry of the *nol. pros.* or dismissal, the jurisdiction held by the United States over the person and custody of the appellant by virtue of the international process under which his custody was acquired by the Federal Government

for the specific purpose of enforcing the requirements of the treaty as interpreted by its very nature and province—an obligation devolving primarily on the Government of the United States and resulting not only from the treaty, but from the exclusive authority conferred by the Constitution over the entire subject of extradition—we say that until this extradition jurisdiction held by the United States became extinguished by the final termination of the case all jurisdiction essential to the subsequent prosecution of a subsequent charge of subsequent offense was prohibited to the prosecuting State, not only by the Constitution, the treaty and the Federal statute, the supreme law of the land, but by the principle of the common law referred to in *Taylor vs. Taintor,* 16 Wall., 370.

And as we have pointed out, perhaps with tedious reiteration, even if the United States were to be considered merely the police agent of the prosecuting State, for the capture of the accused, and denied all governemtal authority over the accused or over the case, and assuming further there were no such statute as section 5275, R. S. U. S., still the *treaty* being the supreme law of the land, this in and of itself would necessitate the adoption of the principle that the extradition case be first determined by the prosecuting State before the accused could be legally prosecuted on a subsequent charge of subsequent offense; otherwise the treaty would not be the supreme law. Either this is the meaning of section two of article six of the Constitution of the United States or it has no meaning at all. However, the United States is in no sense the mere or any police agent of the prosecuting State, but acts in all cases of extradition pursuant to treaty, in the exercise of an independent and exclusive authority, and is vested by the Constitution and treaty and statute with an exclusive *extradition jurisdiction* over the accused for the purpose of enforcing the requirements of the treaty—a jurisdiction necessarily coextensive with the pendency of the extradition case, and ending only when the case is finally terminated in the acquittal, conviction, or the dismissal of the accused on *nol. pros.* Until then, whatever the procedure of the prosecuting State, it must be in furtherance of the extradition jurisdiction

held by the United States; if *at variance* with the extradition jurisdiction, such for instance as the subsequent prosecution on a charge of subsequent offense, the acts of the prosecuting State are in contravention of the treaty and the provisions of section 5275, R. S. U. S., therefore void. The prosecuting State can only acquire the requisite authority over the accused, from the United States, while the extradition case is pending and undetermined. In no event can the United States transfer, surrender, or entrust the custody of the accused to the prosecuting State, for trial on a subsequent charge of subsequent offense; nor consent that the custody be so used. This would not be authorized by the *treaty of extradition,* and is therefore prohibited until the extradition case is finally terminated.

VII.

Limited Authority of Extradition.

The question presented on this appeal is not whether the appellant can be prosecuted on a subsequent charge of subsequent offense without affording him an opportunity of returning to the country granting the previous extradition, but whether he can be so prosecuted while the extradition case is pending and undetermined, and he is held in *custodia legis* by the United States for the purpose of enforcing the requirement of the treaty and the Federal statute, and while the essential custody is controlled by the international warrant of extradition issued to the United States pursuant to the *treaty,* for the trial of the accused. We repeat, the test is, Can the United States lawfully surrender the custody of the accused to the prosecuting State for trial on a subsequent charge of subsequent offense while the extradition case is pending and undetermined? Manifestly to do so would be a violation of the treaty, a flagrant abuse and perversion of the international warrant of extradition, and a palpable infraction of the obligation enjoined by the Constitution, the treaty, and the Federal statute upon the

United States *to bring the accused to trial on the extradition charge to a final conclusion, unless the prosecuting State enters a nol. pros. or otherwise grants the accused a final discharge.* So reads the statute and so demands the treaty. His custody was entrusted to the United States solely upon the faith of its promise made another nation that this obligation imposed by the treaty would be strictly kept and *bona fide* performed, subject, of course, as stated, to a dismissal or *nol. pros.* of the case. It is the United States and not the State of California that acquired the custody of the accused from the nation granting the extradition. It is the United States and not the State of California that solemnly entered into an obligation with the nation granting the extradition, to bring the accused to trial to a final conclusion on the extradition charge, subject to its termination by dismissal or *nol pros.* It is the United States and not the State of California that is a party to the treaty and to the extradition. It is the United States and not the State of California that is vested with the extradition jurisdiction over the person of the accused, ending only when the case itself is terminated by acquittal, conviction, or *nol. pros.* It is the United States and not the State of California that receives and is vested with the controlling authority of the international warrant of extradition, and the process does not become *functus officio* until the final termination of the case. It is the United States and not the State of California that is responsible to the nation granting the extradition for a proper and complete compliance with the requirements of the treaty, whether express or implied, and the full performance of the obligations imposed by the paramount law of the extradition. It must and does follow that the extradition jurisdiction thus conferred upon and held by the United States over the person of the accused for the purpose of executing the treaty is supreme and exclusive, and that any assertion of authority made by the prosecuting State over the person of the accused *at variance* with this paramount jurisdiction held by the Federal Government is in conflict with the supreme law of the land; that consequently the State cannot lawfully prosecute

the accused on a subsequent charge of subsequent offense while the extradition case is pending and undetermined, but may do so when the case is finally terminated on a *nol. pros.* or dismissal and the extradition jurisdiction has thereby ended. Any such prosecution before then is in violation of the treaty and in violation of the statute enacted by Congress for the due and proper enforcement of the treaty; it is in violation of the extradition jurisdiction held by the United States over the person of the accused for the purpose of complying with the requirements of the treaty, and with the statute passed by Congress for its enforcement; and it is in violation of the custody held by the Federal Government in virtue of the international warrant of extradition, the process that under the treaty necessarily controls the *custodia legis*, and runs exclusively to the United States because of its supreme authority over the entire subject of extradition pursuant to treaty, an authority that admittedly is exclusive of the several States, prohibiting them from all proceedings *at variance* with the purpose of the extradition while the case against the accused is pending and undetermined; or, to use the emphatic language of the Federal statute, *"until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter."* And this statute expressly provides that he shall be held in safe custody by the United States until the final termination of the case. Therefore all State custody in the meantime essential to the acquisition of jurisdiction over the accused on a subsequent prosecution of a subsequent charge of subsequent offense is prohibited by the supreme law of the land, because *at variance* with the fundamental purpose and requirement of the treaty, because in conflict with the extradition, and because an invasion of the *custodia legis* held by the United States in right of its exclusive authority over the subject of extradition pursuant to treaty, conferred upon the Federal Government by the Constitution. Because of this exclusive authority vested

in the United States, the prosecuting State can derive no jurisdiction over the person of the accused except as delegated by the Federal Government for the specific purpose of trial to a final conclusion of the extradition charge, and the United States is prohibited by the treaty from transferring the necessary custody of the accused to the prosecuting State for trial upon a subsequent charge of subsequent offense while the extradition case is pending and undetermined, *as the treaty has granted no such authority.* As held by the decisions cited at page 71 of appellant's brief, the State acquires no jurisdiction merely by reason of the fact that a crime has been committed in violation of its laws. Jurisdiction can only be acquired by service of process. The proceeding is essentially *in personam.* The point is that the international warrant of extradition controls the custody of the accused, and confers it upon the United States for the one specific purpose of giving effect to and enforcing the *treaty* requirement of a trial to a final conclusion unless there is a *nol. pros.* of the charge. The prosecuting State acquires the necessary judicial custody of the accused by virtue of the special and delegated authority granted by the United States for the specific purpose of trial of the extradition charge to a final conclusion. The State cannot transcend this special and limited authority, nor acquire any custody or jurisdiction *at variance* with it, while the extradition case is pending and undetermined, for this would be in violation of the treaty and the statute; but, as stated, a *nol. pros.* may doubtless be entered, in which event the prosecuting State may rightfully proceed and take the custody of the accused on a subsequent charge of subsequent offense and maintain legally the requisite prosecution. Under no circumstances could the State *hold in check* the extradition process held by the United States in control of the custody of the accused and prosecute him on a subsequent charge of subsequent offense while the extradition case is pending and undetermined.

Speaking of treaties of extradition, LAWRENCE says:

> "The treaties are obligatory on the component States as well as upon the nation. They control the

> law, the power of the legislature and the power of the judiciary, in the sense that an inferior law cannot hold in check a stipulation of a regular treaty."
> *Lawrence's Com. sur Wheaton,* vol. 4, p. 503.

The stipulation of the treaty, necessarily implied from its very existence and purpose, requires that the accused be brought to trial to a final conclusion on the extradition charge in due course of law, without interference or interception by any other prosecution on a subsequent charge of subsequent offense while the extradition case is pending and undetermined. To hold, as does Mr. Justice Peckham on the former appeal, that the case is no different from that of any ordinary prosecution pending in the State court where there has been no extradition pursuant to treaty, and that therefore the State may exercise its common-law right of election as to which prosecution it will first take up and determine, is to absolutely obliterate the extradition and the extradition jurisdiction and all obligations derived therefrom—in effect, abolishing the treaty, the statute passed by Congress to enforce it, and the Federal custody of the accused, held by the United States pursuant to the exclusive authority vested by the Constitution and the international warrant of extradition. We repeat: The accused is not brought into the United States nor before the State court on any State process whatever. His custody is controlled exclusively by the warrant of extradition until the case is finally terminated by acquittal, conviction, or *nol. pros.,* or other final discharge, and no other or different custody, such as is necessary on a subsequent prosecution of subsequent offense, is permitted by the treaty or the Federal statute enacted to enforce it, nor by the exclusive authority vested by the Constitution in the United States over the subject of international extradition. The conclusive point is, that the several States retain no reserved right to the custody of the accused for a purpose *at variance with the extradition* while the extradition case is pending and undetermined, for any such right would be in conflict with the extradition jurisdiction, the *custodia legis* held by the United States under exclusive authority

granted by the Constitution, in supreme control of the essential custody conferred by the international warrant of extradition in enforcement of the fundamental purpose of the treaty.

VIII.

Fraudulent Extradition.

On the point presented and discussed in the brief of appellant as to the fraudulent nature of the extradition, we submit the following very pertinent excerpt from the opinion of a distinguished jurist, Mr. Justice Campbell, in a case from Michigan.

The reasoning is approved by Moore in his work on Extradition. Said the distinguished judge, speaking for the court:

> "Can a person who has been demanded for prosecution as a criminal, and who could not have been demanded on any other ground, be arrested after arriving here, on a different complaint, and have his original accusation dropped by the same prosecuting authority? If the requisition had been made for an expressly fraudulent purpose, and with no expectation of prosecution for the crime which was its pretext, we do not think any department of the Government could sanction such a use without the plainest perversion of justice. No ingenious reasoning could remove from such a transaction the disgrace which no decent Commonwealth could afford to incur. It does not seem very clear to us that it would be much less fraudulent in law or wrong in fact to take advantage of such an extradition for a similar purpose, when it is discovered that it never ought to have been demanded, and was obtained on insufficient grounds."
>
> *Matter of Cannon*, 47 Mich., 481.
> 2 *Moore on Extradition*, sec. 642.

This is precisely the case of the appellant. The State, finding it impossible to sustain the charge on which the extradition was obtained, substituted a derivative accusation

that depended entirely for its existence on the antecedent fraudulent extradition. The excerpt we have given from the opinion of Mr. Justice Campbell, and concurred in by Moore in his work on Extradition, is especially correct in principle when applied to extradition pursuant to treaty, where the utmost good faith is required by international law, and where the prosecuting State is prohibited from diverting the custody conferred by the warrant of extradition to a purpose not within the purview of the treaty or beyond the legitimate scope of the authority specially delegated to the United States by the specific extradition in the particular case, as limited by the restrictions of the international process or warrant in virtue of which the custody is acquired. The situation has been held to be different in respect to a subsequent prosecution of subsequent offense where the extradition case has first finally terminated; but *per contra* and according to international law, and on principle, the rule is otherwise, it being well settled that for all purposes of prosecution other than upon the specific charge on which the extradition was avowedly obtained the accused is deemed *constructively* present in the country granting the extradition, thus necessitating a new extradition or an extension of the prior extradition, on a subsequent charge of subsequent offense, and therein the production of *prima facie* evidence of criminality sufficient to establish probable cause as required by the treaty in the first instance, in order to justify the further abridgment of the asylum conferred on and reserved to the accused by the foreign State, as an inseparable condition of the prior extradition.

Heffter Droit International, par Geffeken, p. 145.
Albany Law Journal, vol. 16, p. 363.
Lawrence's Com. sur Wheaton, vol. 4, p. 507.
Vazelhas Etudes d'Extradition, p. 155.
2 *Moore on Extradition*, p. 1042.

In the preface to his treatise on Extradition, Moore points out that

> "Whatever may be our theories as to the duties of nations, the leading rules on the subject of extradition presuppose and are deduced from the right, in strict law, of every sovereign power to grant asylum to fugitives from justice."

It is this principle that constitutes the basis of treaties of extradition and requires a *new* extradition on a charge of subsequent offense or the extension of the previous extradition by the country of acquired asylum.

Foreign Rel. U. S., 1876, p. 287.
Billot Traité de l'Extradition, p. 308.
2 *Bernard Traité de l'Extradition*, pp. 483, 493, 510. 516, 570.

The ruling on the former appeal is in conflict with these authorities; but we suppose that at times it is justifiable in the interest of advanced governmental policy that principle be made to yield to expediency, though doubtless it would be better that the change in the law come from Congress or treaty, and not the judiciary. While we agree with Mr. Justice Peckham that the accused can have no inherent right of asylum, still he has acquired one, and is vested with legal rights enforceable in any court of competent jurisdiction. Speaking of the decision in *Ker vs. Illinois*, 119 U. S., 436, that kidnapping the accused is no objection to the acquisition of valid jurisdiction, Mr. Hawley, in his treatise on Interstate Rendition, says:

> "This is the rule in all cases except where a prisoner has been extradited by virtue of a treaty or under the Constitution and laws of the United States. In such cases the demanding government owes a duty, not to the prisoner himself, but to the government which surrendered him, not to violate the compact under which he was surrendered. And this compact, it is settled, the courts will give effect to at the instance of the prisoner himself."

We insist, however, that as the *treaty* is the supreme law of the land, so far as the United States and the several

States are concerned, and not merely a compact, the prisoner has the legal right to enforce its provisions and requirements in any court of competent jurisdiction to the extent his liberty is protected or conserved by the law of the extradition.

IX.

The Treaty Right of Return.

The right of return—the *jus revertendi* of international law—in extradition cases is an implied stipulation or condition of every extradition pursuant to treaty, and is a legal right vested in the accused, enforceable by *habeas corpus* where its due and efficient exercise is impeded, obstructed, or interfered with by an illegal imprisonment, whether illegal because in violation of the law of the State or the laws of the United States. This well recognized and firmly established legal right of return vested by every extradition treaty in the accused becomes operative and enforceable when he is acquitted; or, if convicted, when he has served the sentence imposed; or, if convicted on a subsequent charge of subsequent offense, he has either served the sentence or been released because of the illegality of the imprisonment. Section 5275, R. S. U. S., has also been held by the United States Supreme Court to be declaratory of this treaty right of return to the country from which the extradition was obtained. The point itself is important in appellant's case as entitling him to the writ of *habeas corpus* from the United States District Court in enforcement of the treaty and the Federal statute, as against an illegal imprisonment obstructing and preventing the due and efficient exercise of the treaty right of return, and in that behalf making it incumbent on the court to determine whether the imprisonment is illegal either under the laws of the State or the laws of the United States, and if it is, to remove the unlawful obstruction to the treaty right by means of the writ of *habeas corpus*. On the former appeal the treaty right of return had not accrued; but since then it has become vested by the dismissal or *nol. pros.* of the extradition case.

It is the contention of appellant that the due and proper exercise of the treaty right of return is being unlawfully obstructed by an illegal imprisonment, and illegal because in violation of the laws of the State in the particulars pointed out in the petition and the brief; and also illegal because in violation of the treaty and laws of the United States for the reasons specified in both the petition and the brief. We concede there is no right of return as against a pending prosecution on a charge of subsequent offense; this will serve to differentiate the decision on the previous appeal.

X.

The Decision on Former Appeal.

We cannot understand (and we say it with much deference) why it is the court in its decision on the former appeal refers to the English extradition act or to article 3 of the convention of July 12, 1889. The English extradition act does not apply to Canada (*Clarke on Extradition*, 125, 4th Ed.). But both of the quoted provisions set forth in the court's opinion, as taken from the English extradition act and the convention of July 12, 1889, relate exclusively to the absolute immunity and exemption of *prior offenses* from prosecution—an entirely different subject from that of prosecutions for subsequent offenses. The latter never had, nor did any one so far as we are informed, ever claim for them, the same immunity or exemption from prosecution as that always accorded prior offenses; they are not at all in the same category, and therefore the specification of prior offenses in both the English extradition act and the convention of July 12, 1889, is no just or legal or logical or reasonable basis for any inference or deduction that prosecution of subsequent offenses can be lawfully had without need of a *new extradition* or the extension of the previous extradition. It seems to us quite clear that the point the court seeks to make by the excerpts taken from the English extradition act and the convention of July 12, 1889, is manifestly a *non sequitur*, and

does not tend in the slightest degree to show that a subsequent charge of subsequent offense can be prosecuted without the necessity of the *new extradition* or the extension of the previous extradition, required by all the authorities on international law, some of which are above cited and subsequently quoted in this supplemental brief.

As to the treatise of Spear, cited in the court's opinion, he of course is not an authority on international law, and may possibly have had in mind common-law doctrines or some rule of the municipal law; but we think that, rightly interpreted, he simply holds there is no asylum granted the accused as to subsequent offenses, and, properly understood, there can be no doubt this is true; but still, according to the writers on international law, in order to determine the preliminary question whether there is probable cause to believe the alleged subsequent offense was committed, there must be a *new* extradition, or, which is the same thing, an extension of the previous extradition, and therein the requisite evidence of criminality required by the *treaty*, must be presented to the country granting the first extradition; otherwise the asylum reserved as necessarily incidental to every extradition pursuant to treaty might be defrauded by a false or fabricated charge of crime, specially contrived for the purpose.

Foreign Rel. U. S., 1876, p. 279.

What Spear undoubtedly means is, that as to subsequent offenses, the accused has not the absolute immunity of asylum he acquires against prior offenses; and this, as we have shown, is perfectly true. The point we make, however, is that the accused cannot be prosecuted on a subsequent charge of subsequent offense until a new extradition is granted, or, which is the same thing, until there is an extension of the extradition previously obtained; and this to protect the antecedently acquired asylum from false or fraudulent charges of subsequent offense by submitting to the country awarding the preceding extradi-

tion the requisite evidence of criminality as a necessary preliminary and prerequisite to the subsequent prosecution. On this the accused is entitled to a hearing; but his custody in the meantime need not be disturbed, but may remain with the prosecuting State. He has no right of return. The treaty is complied with if the required evidence of criminality is furnished the foreign country as prescribed by its provisions. The accused is only deemed *constructively* present in the country granting the previous extradition and entirely for the purpose of requiring the preliminary evidence of *prima facie* criminality as a condition pecedent to the subsequent prosecution.

Says BILLOT:

> "The engagements taken by a government not to permit the extradited to be tried on any charge but the one on which his extradition was granted must be interpreted in this sense—that he shall be considered absent respecting all prosecutions for infractions not covered by the extradition."
>
> *Billot Traité de l'Extradition*, 313.

This can only pertain to subsequent offenses, as the prosecution of prior offenses is foreclosed by the previous extradition; this doctrine as to prior offenses is held to be a well-settled principle of international law, by the decision in the *Rauscher Case*, 119 U. S., 407.

What Spear had probably in mind is that the same absolute immunity or exemption from prosecution of prior offenses did not extend to subsequent offenses, but the latter may be prosecuted upon a *new extradition*, or, which is the same thing, with the consent of the country granting the first extradition, after the requisite evidence of criminality is furnished. This is sometimes referred to by writers on international law as an "extension of the extradition."

2 *Bernard Traité de l'Extradition*, 516.

All writers on international law agree that there must be a new extradition for subsequent offenses, or, which is the

same thing, an extension of the previous extradition. Lawrence presents with his approval the following pertinent excerpt from *Fiore on International Law:*

> "If after the extradition is obtained, a new crime is discovered, a new demand of extradition must be made and accorded before the person extradited can be prosecuted or punished for the new crime."
>
> 4 *Lawrence's Com. sur Wheaton,* p. 507.

This cannot apply to prior offenses, because they are foreclosed by the preceding extradition, and are entirely and absolutely exempted from all prosecution, as held in the *Rauscher Case,* 119 U. S., 407;—a decision long prior to article 3 of the convention of July 12, 1889; it must, therefore, refer only to subsequent offenses or it is meaningless.

Manifestly it is not required that the actual custody of the accused be changed in order to obtain a new extradition or the extension of the previous one. He is constructively absent and this will suffice to satisfy the treaty.

Says BERNARD:

> "Mr. Billot is of the opinion that the judicial power must not proceed to try the extradited person, where a new crime is discovered since the extradition. This means it cannot be done except by opening negotiations, so as to obtain an extension of the extradition."
>
> 2 *Bernard Traité de l'Extradition,* 516.

Of course, a "new crime" cannot mean a prior offense. The latter is foreclosed by the preceding extradition. It must, therefore, mean a subsequent offense. And in the fifth *Annuaire,* p. 332, of the Institute of International Law, the twenty-third resolution is to the same effect as the doctrine stated by Bernard. It is as follows:

> "The government which has granted an extradition may thereafter consent that the person extradited be tried for acts other than the one which was the basis of his being sent back: *Provided,* That these acts can be the basis for extradition."

Quite true, it is a question as to the meaning of the Ashburton treaty; but treaties are not interpreted or construed according to the rules of criminal procedure prescribed by the common law, but according to the principles of international law. As pointed out, the theory on which the new extradition or an extension of the prior jurisdiction is required in respect to subsequent offenses is *that the asylum previously granted the accused by the foreign nation,* may be protected against false or simulated charges of subsequent offenses by exacting what the treaty requires in all cases of extradition, to wit: sufficient evidence of criminality to justify the further abridgment of the reserved right of asylum—an inseparable condition of every extradition pursuant to treaty. And this *treaty* prerequisite of sufficient evidence of criminality must be determined by the country which granted the preceding extradition. So reads the *treaty.* We repeat, it does not, however, require a transfer of the actual custody of the accused for the purpose. His constructive presence in the country granting the preceding extradition, is sufficient to meet the treaty requirements that he be within its territory. This discussion, of course, has no relevancy to the point we make in respect to the *extradition jurisdiction* vested by the treaty and the statute and by the Constitution in the United States, prohibiting a subsequent prosecution of a subsequent offense while the extradition case is pending and undetermined.

XI.

The Other Points Raised in the Petition and Brief.

The other points urged by appellant for reversal of the judgment from which the appeal is taken are fully, and we think sufficiently, presented in our brief heretofore filed. However, it may be said, in respect to the point that the "trial court" was a nullity and not a tribunal of competent judicature, nor vested with jurisdiction over the person or subject-matter, the objection we make is that the amend-

ment to section 8 of article 6 of the State constitution does not apply to appellant's case, as he was tried, convicted, and sentenced more than four years *prior* to the adoption and taking effect of the amendment. It cannot be given an *ex post facto* operation, for that is prohibited by section 10 of article 1 of the Constitution of the United States. The amendment to section 8 of article 6 of the State Constitution is imporant here, only because it furnishes the correct construction or interpretation of the section as previously existing.

XII.

Conclusion.

We deem it important that we state with greater precision and more specifically the propositions asserted at pages 9, 13, 14, 16, 42, and 44 of our brief heretofore filed. The point we there endeavor to make is this: False testimony that the prosecutrix *was not* a party to a marriage ceremony the statute (to wit, section sixty-one of the Civil Code of California) expressly declares void *ab initio*, were she a party to it, can have no relevancy in the extradition case; and it being testimony pertaining to a mere *nullity*, it cannot be made the competent or valid basis of a charge of perjury. (See authorities cited, appellant's brief, pages 15 and 39.) It would be different if perjury were assigned on testimony as to facts showing or tending to show that the ceremony were it with the prosecutrix would not be a legal marriage, but void by statute. However, no such charge of perjury has been made or attempted, and it could only be possible by assigning perjury on the testimony establishing the pre-existing common-law marriage; but that marriage is a fact in the case the prosecution has never controverted nor included in any assignment of perjury. It is the paramount and decisive fact, fully sustaining and maintaining the absolute innocence of appellant on both perjury charges, to wit: the one in the extradition case and the one on which the conviction was obtained.

The charge on which the conviction rests is either that of perjury in denying a legal marriage with the prosecutrix or perjury in denying that she was a party to a ceremony not constituting a legal marriage with her. If the first of these two crucial and determinative propositions be the correct one, then manifestly the rejected defense was conclusive in law, because it not only establishes the *nullity* of the ceremony averred in the indictment as the basis of the charge, but it also establishes the absolute *truth* of the testimony assigned as perjury. If, on the other hand, the second of the above stated crucial propositions is the correct one, to wit: that the charge is perjury in denying that the prosecutrix was a party to a ceremony not constituting a legal marriage with her, then the assailed testimony was not only irrelevant in the extradition case, but the rejected defense of *nullity* was conclusive in law against the accusation, as held by the authorities cited in the brief, pages 15 and 39. There is no ruling to the contrary in any case to be found in the books; and the contention as we present it, is and always has been the law of California—a proposition of which the Supreme Court of the United States will take judicial notice on this appeal. In the complaint or petition for *habeas corpus* we have stated in concise averment the substance of the two perjury indictments, but in the transcript of record on the former appeal, *sub nom* Collins *vs.* O'Neil, No. 241, October term, 1908, pages 16 and 18, the two indictments are set forth at length. The court will, on this appeal, also take judicial notice of that record and of the contents of the indictments. Contrasting the two indictments, it will be seen that the one in the extradition case charges perjury in denying a legal marriage with the prosecutrix, but the indictment on which the conviction was obtained charges perjury in denying that she was a party to a ceremony not alleged to constitute a legal marriage with her; nevertheless, a denial that she was a party to the ceremony is a denial of a marriage with her, to wit: a legal marriage, *and the rejected defense is conclusive that this denial is the absolute truth, and no perjury.* In any possible view that may be taken of the case—whether we take

the charge as that of perjury in denying a legal marriage with the prosecutrix or perjury in denying she was a party to a ceremony not constituting a legal marriage with her, had she been a party to it, or perjury in testifying to facts showing or tending to show the marriage void by statute, or taking any other state of facts that might be suggested or supposed, by way of pertinent hypothesis—the rejected defense was legally conclusive against the charge, and established in law the absolute innocence of the accused. The arbitrary rejection of such a defense is clearly a violation of the constitutional right to the *due process of law* guaranteed the appellant by the Fourteenth Amendment of the Constitution of the United States. So hold the authorities cited on pages 36 *et seq.* of appellant's brief, heretofore filed on this appeal. *False testimony in the extradition case that the prosecutrix was not a party to the ceremony of May* 15, 1889, *would be perjury only in the event that the ceremony constituted a legal marriage with her.* Therefore the rejected defense was conclusive in law that no perjury had been committed, for it established the point that by section sixty-one of the Civil Code the ceremony of May 15, 1889, were it with the prosecutrix, was void *ab initio* by statute, and no legal marriage; it established the point that as the assailed testimony related to a mere *nullity,* it could not constitute perjury in the extradition case—a point very elementary in criminal law, and fully sustained by the authorities cited on pages 15 and 39 of the brief. There is yet another important point we wish to press upon the attention of the court. It is this: False testimony tending to support or defeat the accusation in the extradition case would undoubtedly be perjury, but false testimony that the prosecutrix *was not a party* to a marriage ceremony the statute expressly denounces as void from the beginning, and no legal marriage were she a party to it, could not be perjury in the extradition case, as it would neither tend to support nor defeat the accusation there made, which does not pertain to the question of identity of the parties participant in a confessedly void marriage, but relates only to the existence of a valid and legal marriage.

It would be different as to false testimony tending to show that a perfectly legal and valid marriage was a void one; in that event the testimony would unquestionably be perjury in the extradition case. Such a charge would only be legally possible by assigning perjury on the testimony establishing the pre-existing common-law marriage, and that has never been attempted by the prosecution; on the contrary, they have never disputed the fact nor charged perjury upon it. So, too, it would be perjury in the extradition case if it were there falsely testified that the prosecutrix was not a party to what was in fact a legal marriage; but there is no such charge made against appellant. *In any event, whether the charge were perjury in denying a legal marriage with the prosecutrix or perjury in denying that she were a party to a ceremony not constituting a legal marriage with her, the rejected defense was and is conclusive in law against the accusation.* We repeat, this is and always has been, the law of California, and the Supreme Court of the United States will take judicial notice that such is the case.

In conclusion, we would also make perfectly plain the point that the *extradition jurisdiction* vested in the United States by the supreme law of the land is coextensive with the pendency of the extradition case and cannot be obliterated or destroyed by merger in the municipal authority of the prosecuting State, so as to permit the exercise of the common law right of election in favor of giving priority to the subsequent prosecution of a subsequent offense—a proposition axiomatic on principle and quite fully discussed both in this and the opening brief of appellant. While the extradition jurisdiction continues to control the custody of the accused, it is necessarily supreme and exclusive; therefore the common-law right of the State to make an election between pending indictments for purposes of prosecution has no application to the case. And, notwithstanding the views of Mr. Justice Peckham to the contrary (we say it most deferentially), both the country granting the extradition and the United States are intensely interested in maintaining the

supremacy of the extradition jurisdiction conferred by the *treaty* and the paramount authority and restrictions of the international warrant of extradition over the person of the accused, to the exclusion of all local or municipal authority of the prosecuting State on a subsequent charge of subsequent offense. Therefore the learned justice was clearly wrong in asserting a doctrine in conflict with this principle. And he is equally and obviously in error when, by simple *ipse dixit*, he declares—

> "there is nothing in the section of the U. S. R. S., *supra*, which gives the least countenance to the claims of the plaintiff in error" (referring to section 5275, R. S. U. S.).

If this were so, the statute would be meaningless and its purpose nullified by a fugitive and mystic interpretation that finds no attempt at reasoning to give it the requisite judicial vitality. The more we endeavor to override the barrier erected by the law for the protection of the fundamental rights of the individual, the more arbitrary, despotic, and violent are our conclusions. It would also be well to consider that the farther we extend the criminal authority of the State in extradition cases, the more we endanger by force of the precedent, the life and liberty of American citizens extradited to foreign countries when thereafter arrested on unfounded charges of subsequent offenses. It is no answer to say we must rely on the good faith of other countries. This has never been deemed an adequate reason for dispensing with the necessity of the protection of established law. The dominating mistake, in the opinion on the former appeal, is the effort to reduce the supremacy of the extradition jurisdiction to the level of, and, indeed, make it subordinate to, the merely municipal authority of the criminal code of the prosecuting State, and precisely to the same extent as if there had been no extradition at all and the accused had always been within the territorial jurisdiction of the State court. The evident import of the decision is to merge and therefore abolish the ***extradition jurisdiction*** held by the United States over the

person of the accused to enforce the fundamental purpose and requirement of both the treaty and the statute, by absorption into the municipal or local authority of the prosecuting State on a subsequent prosecution for an alleged subsequent offense. It is scarcely necessary to say that this magical transformation of the greater into the lesser is beyond the power of the courts to accomplish, and that the supremacy of the Federal extradition jurisdiction cannot be amputated at the point where the accused comes within the restricted and specially modified territorial authority of the prosecuting State, solely because under a limited power he was brought there by the United States for a specific purpose prescribed by the *treaty*, and is held by Federal authority in *custodia legis*, pursuant to the treaty and the international warrant of extradition; this does not leave him subject to the criminal code of the State as completely and to the same extent as if he had never been extradited and had never gone across the boundary line nor beyond the reach of the State's process. The principle is elementary that the extradition jurisdiction extends over the person of the accused for the purpose of enforcing the fundamental requirement of the treaty, from the moment he is delivered to the United States pursuant to the international warrant of extradition until the final termination of the case in acquittal, conviction, or *nol. pros.* And this extradition jurisdiction is that of the Federal Government exclusively, and cannot be superseded or made subservient to State authority by the legerdemain of serving on the accused a bench warrant of a State court. For all purposes of prosecution of the charge specified in the *warrant of extradition*, the latter is the only permissible process, and it controls the custody, therefore the prosecution, of the accused, to the exclusion of all State process, either on the same charge or on a subsequent charge of subsequent offense *while the extradition case is pending and undetermined.* This is what is meant by the contention that the treaty and its requirements are the supreme law of the land. The entire question is fully discussed in appellant's brief, heretofore filed, and we are

simply supplementing the argument there made with some additional suggestions of sufficient importance to justify the effort to make our contention clearly understood and avert the misapprehension that led to the ruling on the former appeal. Many of the points we now raise in the complaint or petition for *habeas corpus* and discussed in the brief were neither presented nor decided on the previous appeal and are not to be prejudiced by anything there determined. The only purpose of this supplemental effort is to release from possible obscurity or ambiguity some of the principal points presented. As to all the other points raised by appellant we are certain they are made sufficiently clear and explicit in the argument heretofore presented to render unnecessary any further attempt to attain the conclusiveness of what would seem to be self-evident and axiomatic.

We respectfully insist that the points urged in appellant's briefs are fully sustained by principle and precedent; that, therefore, the judgment of the United States District Court should be *reversed*.

The appellant is simply seeking the protection of the law. This was denied him in the State courts; and, although it is his misfortune to be accused of crime, he is not for that reason to be deprived of his legal rights on the very malevolent and barbarous theory prevalent in the "trial court," that he must be condemned to *outlawry* lest he be acquitted. "Nor" (to quote a distinguished authority) "can we conceive of anything more dangerous than to bring down great and important principles of the law to the level of the merits or demerits of the individual to whose case these principles are justly applicable. That is not the way in which we act in this country with regard to our criminal law, on the great principles of which we all depend for our lives and liberties. If in a particular case we were to overstrain or overthrow those great principles to insure a conviction the law prohibits, the evil which we would have done would be sure to come back upon us. There are some words that fell on the subject from a great master of history which are the words not only of a historian, but of a philosopher.

He says: 'We are ever too ready in the trial of a man against whom an unjust and violent prejudice happened to have arisen in the public mind to strain and compromise those general laws to which we have all to look for protection in the time of our adversity; and thus, when the day of trial comes, we find those laws no longer in existence.'" It is comparatively of small consequence that this or that man be condemned in violation of law; *but ours being a government of laws and not of men,* it is of utmost importance to the perpetuity of American institutions, in pristine efficacy, that the law of the land be sacredly maintained and religiously enforced, irrespective of whether the legal right is vested in a person despised or admired, nor whether he be of good or bad repute. The law is no respecter of persons. It condemns them for their conduct if it be contrary to its mandate, not for the enmities they may have rightly or wrongly incurred in the stress and strain of the conflict. Nor can any greater crime be committed against government than to use the criminal law as an engine of persecution and oppression, or to satiate the infamous demands of private vengeance against one who has committed no wrong (Rec., p. 16), but been unfortunate enough to incur the implacable hatred of influential opponents, powerful enough to appropriate and wield the authority of the State in perversion of its criminal law, to the accomplishment of an outrageously vindictive purpose.

The appellant is compelled by force of circumstance to represent himself; but this, of course, should not be permitted to impair his equal right to a hearing of his case or to the same consideration of the points raised as if he were represented by counsel other than himself. It is expressly provided by statute:

> "In all courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys-at-law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."
>
> *The Judicial Code,* sec. 272.

Of course, the appellant would much prefer, and for obvious reasons, to be represented by other counsel; but as this is impossible under the circumstances, he is compelled to exercise his legal right and represent himself—he trusts, without prejudicing the manifest merits of his case.

Respectfully submitted,

GEORGE D. COLLINS,
Counsel for Appellant.

Dated at Washington, in the District of Columbia, October term, A. D. 1914.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court.

ADDENDA.

I.

As to the point raised respecting the rejected defense, we say that even assuming the indictment in the case where the conviction was obtained charges perjury in denying a legal marriage with the prosecutrix, *the rejected defense* is not only conclusive in law because the assailed testimony pertains to a nullity, but it is also conclusive because it shows there was no perjury, in that it establishes the absolute truth of the testimony. So, too, if the indictment does not charge perjury in denying a legal marriage with the prosecutrix, but simply accuses him of perjury in denying that she was a party to a ceremony not constituting a legal marriage with her—one declared void by statute for the very reason she was a party to it—then the rejected defense is also conclusive in that the assailed testimony pertains only to a mere nullity, and therefore, if false, cannot be made the competent or valid basis of a charge of perjury. (See authorities cited on pages 15 and 39 of appellant's brief, heretofore filed on this appeal.) False testimony that the prosecutrix *was not a party* to the ceremony of May 15, 1889, could not by any possibility be perjury in the extradition case, unless the ceremony constituted a legal marriage with her. The rejected defense, showing, as it did, that the ceremony was void by statute and not a legal marriage, was conclusive in law against the accusation on which the conviction rests and established the innocence of the defendant. It is held by the authorities cited on page 36 of appellant's brief that the arbitrary rejection of such a defense is the deprivation of the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The substance of the charge in each indictment is given in the complaint or petition for *habeas corpus;* both indictments are set forth at length in the transcript of record on the

previous appeal *sub nom.* Collins *vs.* O'Neil, No. 241, Supreme Court of the United States, October term, 1908, pages 16, 18. Of this record on the former appeal, and of the contents of the indictments, the court will, on this appeal, take judicial notice. Such was the ruling made by the court in *Dimmick vs Tompkins,* and since then in a recent case.

II.

Either the indictment in the case where the conviction was obtained charges the appellant with perjury in denying a marriage—a legal and valid marriage with the prosecutrix—or it charges him with perjury in denying that she was a party to a ceremony that did not constitute a legal marriage with her. In the first hypothesis the charge, if proved, would be perjury in the extradition case. In the second hypothesis stated, it would not be perjury, as it is entirely irrelevant in the extradition case that she were or were not a party to a ceremony which *ex concessi* did not constitute a legal marriage with her. On either of the two and only possible hypotheses stated it is a perfectly good and, in law, a conclusive defense that the marriage or marriage ceremony, if with the *prosecutrix,* as is contended by the State, is not a legal marriage, but void *ab initio* by section 61 of the Civil Code of California, which provision of the law of that State is as follows, viz:

> "A subsequent marriage contracted by any person
> " during the life of a former husband or wife of such
> " person, with any person other than such former
> " husband or wife, is illegal and void from the be-
> " ginning, unless the former marriage had been an-
> " nulled or dissolved."

There are certain other provisions in the statute but they are not pertinent here. The preceding, pre-existing, and perfectly valid common-law marriage with a person other than the prosecutrix has never been controverted nor im-

peached by the prosecution or any one else. It was dissolved by death in May, 1901 (Record, pp. 4, 7).

The basic and undisputed fact of prior marriage makes void the ceremony of May 15, 1889, if with the prosecutrix, and this is the point raised by the rejected defense.

Of course we recognize that testimony in the extradition case, tending to show the marriage void, would, if false, be a competent basis of a charge of perjury, but no such charge has ever been made (Record, pp. 5 and 7), and even if it had been made the rejected defense would be legally conclusive against it, for it would establish the truth of the testimony.

III.

On the point of excessive sentence, it is also to be borne in mind that the appellant was not convicted of perjury in denying a legal marriage with the prosecutrix (Record, p. 5), but of perjury in denying that the prosecutrix was a party to an undisputed void marriage ceremony, and this in a case where the cause of action depended entirely for its basic facts upon the averment of a legal and valid marriage with her. In respect to the Eighth Amendment of the Constitution of the United States we, of course, are aware that it does not apply to the several States, but our contention is that on the special facts pleaded in the fifth paragraph of the complaint or petition (Record, p. 19) the case is one pertaining to the Government of the United States and its treaty obligations. The Eighth Amendment is a guaranty to foreign nations and to the accused in cases of extradition pursuant to treaty that the punishment will not be cruel or unusual or grossly excessive, and that the treaty right of return will not be infringed or violated by means of an excessive and therefore unlawful sentence.

IV.

In all cases of extradition pursuant to treaty, the *custodia legis* over the person of the accused is vested by the Constitution, by the treaty, and by section 5275, R. S. U. S., *in the United States,* from the time of the surrender until the final termination of the case in the conviction, acquittal or dismissal of the accused on *nol. pros.* or other final disposition of the charge. The United States may deliver the actual custody to the State court for the purpose of prosecution on the specific charge designated in the international warrant of extradition, but is denied by the treaty and the statute all authority to surrender the accused to the State court for trial on a subsequent charge of subsequent offense, while the extradition case is pending and undetermined. Except through the United States, and then only by virtue of the specific authority conferred by the *treaty,* the prosecuting State can acquire no jurisdiction over the accused until the extradition case is first finally terminated. This is especially true where the subsequent charge of subsequent offense is merely a substitution in another form of the same charge as that on whch the extradition was granted, or the two charges are so intimately and inseparably related that an acquittal on the extradition charge will be *res adjudicata* of an essential element in the subsequent charge and be a bar to the latter. It would manifestly be a fraud upon the *treaty* and the law of the extradition to permit the substitution; it would operate to defraud the accused of the rights conferred upon him by the treaty and the statute passed by Congress to enforce the treaty and to secure its observance in perfect good faith. Therefore under the guise of a subsequent charge of subsequent offense it would be a plain violation of the law of the extradition, to substitute a similar charge that would be barred by an acquittal on the extradition accusation. In any event the prosecuting State could not acquire the requisite jurisdiction over the person of the accused on the subse-

quent charge of subsequent offense, until the extradition case had first finally terminated in the conviction, acquittal or discharge of the accused on *nol. pros.* or other order or judgment. Any other exercise of jurisdiction over him would be in conflict with both the treaty and the statute, which only authorize his prosecution on the specific charge designated in the warrant of extradition.

After the extradition case has finally terminated then, but not till then, the prosecuting State may secure the necessary jurisdiction over his person on a subsequent charge of subsequent offense. It is too plain for argument that the extradition jurisdiction over the accused cannot be abolished or destroyed by the method of assimilating or reducing the case to one entirely of municipal or local jurisdiction of the prosecuting State, such as it possesses where the accused is apprehended within the limits of its territory, and there has been no extradition pursuant to treaty.

V.

For the reasons given in this brief and also in the brief heretofore filed by appellant on this appeal, we respectfully submit that no subsequent prosecution for an alleged subsequent offense is permitted by international law, nor by the treaty, except upon a *new* extradition, or what is the same thing, upon "an extension of the extradition"; *and this may be legally done without any change in the custody of the accused.* This principle is sustained by all the authorities on international law, and is essential to the protection of the reserved rights of asylum annexed by law to every extradition pursuant to treaty. Needless to say, the decision on the previous appeal is in conflict with this well-settled doctrine of international law, and on the present record may be properly differentiated. We do not contend that the accused has any right of asylum inherent in himself. Our contention is that he has acquired an asylum in the country granting the extradition, and that there is annexed to the ex-

tradition by implied stipulation of the treaty the provision that he shall have the legal right of returning to this asylum after his discharge *in the extradition case;* further, that before this reserved asylum can be abridged, there must be a new extradition, or an "extension of the previous extradition," so as to authorize a subsequent prosecution on a charge of subsequent offense; this to the end that the *prima facie* evidence of criminality required by the treaty be first submitted to the country granting the previous extradition, as in the first instance, with the right in the accused to submit evidence in his exoneration, but not to have his custody transferred in the meantime. This doctrine results from the well-settled principle of international law that as to every prosecution other than the one designated in the extradition, the accused is deemed to be *constructively* within the territory of the country granting the preceding extradition. One would well suppose that the importance of this principle to the United States in protection of both its own citizens and aliens granted an asylum under the protection of its laws is of such self-evident necessity that it would be very tenaciously maintained by the Federal judiciary. Nor can it be rightly said that the principle applies only to prior offenses; it does not apply to such offenses at all, for it is correctly held in the *Rauscher Case,* 119 U. S., 407, that according to international law there can be no prosecution for prior offenses, as they are considered foreclosed by the previous extradition.

In the decision on the former appeal the court seems induced to the conclusion at which it arrived, by the insuperable difficulty of accepting the contention that the accused had a right of return despite the pendency against him of a subsequent charge of subsequent offense. On this appeal we have, we think, effectually eliminated and entirely removed from the case this obnoxious pretension put forth inadvisedly, in support of a supposed, but unsustainable, right of return by conceding that no such right exists, still insisting however on the principle of international law, requiring a new extradition or the extension of the preceding

extradition, in the sense stated in this brief, and which does not involve the necessity of a change in the custody of the accused.

As to all the other points not specially mentioned in this *addenda,* we think they are presented both in the supplemental brief and the main brief of appellant, with sufficient clearness and emphasis, therefore requiring no further effort on our part to make them plain and convincing.

Respectfully submitted,

GEORGE D. COLLINS,
Counsel for Appellant.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court.

Dated at the City of Washington, in the District of Columbia, October term, A. D. 1914.

In the Supreme Court

of the

United States

October Term, A. D. 1914.

No. 594.

GEORGE D. COLLINS, Appellant,

vs.

JAMES A. JOHNSTON, the Warden of the State Prison of the State of California, at San Quentin, County of Marin, Northern District of California, Appellee.

Appellant's Reply Brief and Argument.

In replying by leave of the Court, to the brief and argument presented by counsel for appellee, it is not our purpose to merely reiterate anything already sufficiently discussed in either the brief or the supplemental brief, we have heretofore filed in support of the prayer for reversal; but there are certain propositions urged by counsel for appellee to which we are quite positive a very conclusive answer can in each instance be given, by recourse to elementary principles of law, and adherence to the record. It is, however, to be considered that nothing in this brief is to be taken as superseding nor as dispensing

with any portion of the two briefs heretofore submitted in behalf of appellant, nor construed in derogation of the various points there discussed. In other words, this brief is restricted to an argument *in reply* to the one presented in the brief of the appellee; and has no other or different purpose. It is of the utmost importance to the maintenance and enforcement of appellant's legal rights that his case upon this appeal be fully and adequately presented. Therefore this reply brief.

I.

Arbitrary Denial of Legal Defense. Deprivation of Due Process of Law.

To sustain the Federal question raised on this point, and in law entitle the appellant to judgment of reversal, we need but show: 1st. That the rejected defense is indisputably the law of California, and necessitates the acquittal of the defendant in the case where he was convicted. 2nd. That the "trial court" rejected the interposed defense, on the very ground the law required that the defense be received and sustained. 3rd. That at the very time the "trial court" thus arbitrarily rejected the interposed defense, the Federal question now presented, was raised by the defendant and by the "court" overruled. Not only have we established these three essential requisites affirmatively by the record (Rec., pp. 3, 4, 5, 6), also by the two preceding briefs we have filed, but we have done this beyond all possibility of cavil or controversy.

Therefore it matters not what the State appellate courts decided, nor what their process of reasoning; they having refused to grant relief, the Federal question is properly presented on this appeal, for

decision upon its merits, all State remedies having been exhausted without avail (Rec., pp. 6, 21, 22), and the case in any event being one involving treaty rights; matters fully discussed, and the authorities cited in appellant's opening brief, pp. 17, 32, 35 and 55. The rejected defense being indisputably the law of California, and necessitating the acquittal of appellant in the case where he was convicted, the subordinate and necessarily incidental inquiry, as to whether under Section 118 of the Penal Code of California (see brief, p. 41), the excluded defense establishes the point that the assailed testimony was not material in the extradition case, or whether it establishes the point that the assailed testimony is the truth and no perjury, or it establishes both these points, is really of no practical importance on this appeal. It is sufficient that we show the rejected defense is indisputably the law of California, and that it necessitates the acquittal of the appellant in the case where he was convicted; further that it is a defense going to the merits, and in law establishes the point that the appellant is innocent of the crime of which he stands convicted. The arbitrary rejection of such a defense is clearly the deprivation of the *due process of law* guaranteed by the Fourteenth Amendment of the Constitution of the United States. In other words, the constitutional right to a hearing before condemnation, is the right to be heard in support of a legally sufficient defense to the charge, and therein the right to interpose and maintain such a defense. Otherwise the constitutional right to notice and opportunity to be heard in one's defense, in fact the right to a trial, would be worthless, and worse than useless.

We do not understand that the counsel for appellee dispute or challenge the point that the re-

jected defense is and always has been the law of California, and constituted a legally sufficient defense to the charge of perjury on which appellant stands convicted; but they argue in conflict with it, that evidence showing the ceremony of May 15, 1889, to have been with the prosecutrix, would be material in the trial of the extradition case, because if the ceremony were valid, and not void by section sixty-one of the Civil Code of California, it would establish a legal marriage with her. This contention of counsel really defeats itself, for confessedly and upon the very argument they make, if the ceremony of May 15, 1889, had it been with the prosecutrix, is for that reason, void *ab initio* by section sixty-one of the Civil Code of California, it could not be relevant or material in the trial of the extradition case; now the basic point presented by the rejected defense is that the ceremony of May 15, 1889, were it with the prosecutrix, is absolutely void from the beginning, by section sixty-one of the Civil Code because of the perfectly valid and pre-existing common law marriage to another. The counsel for appellee evidently concede that had they gone before the trial court in the extradition case, and offered evidence in behalf of the prosecution, to prove that the prosecutrix was in fact a party to the ceremony of May 15, 1889, at the same time stating to the court that they did not contend the ceremony constituted a legal marriage with her, such evidence would be properly ruled out because manifestly irrelevant and immaterial. It must be quite clear then that the rejected defense is in law a conclusive answer to the accusation in the case where the conviction was obtained, not only because it establishes the point that the assailed testimony was not and could not be material in the extradition case, but it also estab-

lishes the equally decisive point that the assailed testimony as given in the trial of the extradition case, is the absolute *truth* and no perjury, for first, it shows that properly construed, and therefore, taken as a denial of marriage with the prosecutrix, *it is the truth,* and if taken as a denial that the prosecutrix was a party to a ceremony confessedly not constituting a legal marriage with her, were she a party to it, but, void "from the beginning" by section sixty-one of the Civil Code, then the denial is in that event also the truth and no perjury, for anything void in law is to be considered by the courts as *non-existent,* and as never having occurred; therefore the prosecutrix could not be a party to what the law considers never existed. *Indeed so far as the legal rights of the parties are concerned, they are precisely the same, whether the prosecutrix was or was not a party to the ceremony of May 15, 1889, if it would be void "from the beginning" by section sixty-one of the Civil Code of California, were she in fact a party to it.* Of course, if as we contend, the rejected defense would establish the *truth* of the assailed testimony in the case where the conviction was obtained, this constitutes a legally sufficient defense to the charge, whether the testimony were or were not material in the extradition case; therefore even if the testimony tended to impeach or sustain the credibility of a witness, this would not support the ruling rejecting the interposed defense; but the defense was not rejected on any such theory as that respecting the credibility of a witness, and the record expressly negatives it (Rec., 5, 6); nor is it possible to perceive how you can impeach or sustain the credibility of a witness, by showing that he testified falsely or truthfully to what is void by statute; therefore immaterial matter. Nor did the State appellate courts adopt the

theory of materiality as relating to the credibility of a witness; what is said in their opinions on that topic, is said by way of *illustration* as against an objection made to a general averment of materiality in the indictment. It was not said in reference to the evidence; on the contrary, in respect to the latter, the State appellate courts held the assailed testimony was material in the extradition case, because and only because it went to show that the prosecutrix was not a party to the ceremony of May 15, 1889; and thereto assumed without deciding, that had she been in fact a party to it, a legal marriage would have resulted. They did this by means of a flagrant *petitio principii, per se,* precluding a decision on the point raised that the rejected defense established the *nullity* of the ceremony were the prosecutrix a party to it, and also by ignoring and evading the Federal question presented (Rec., p. 6); they further precluded themselves from passing on the proposition that the rejected defense established both the point that the assailed testimony is the *truth* and no perjury, and the point that the testimony because dependent for its probative force on the mythical and illusive support of an absolute *nullity,*—a thing or ceremony expressly made void by statute, it could not by any possibility be material in the trial of the extradition case. Section sixty-one of the Civil Code of California in terms provides as follows, viz.: "A subse-
" quent marriage contracted by any person during
" the life of a former husband or wife of such person,
" with any person other than such former husband
" or wife, is illegal and void from the beginning,
" unless the former marriage had been annulled or
" dissolved." This is the statute the State appellate courts altogether ignored and evaded, though cited to them in support of the rejected defense, and it is

the statute upon which the rejected defense is postulated, as shown by the record. In other words, testimony dependent for its evidentiary or probative value upon the mythical and illusive support of an absolute *nullity,* cannot if false, be made the competent or valid basis of a charge of perjury. Or as WHARTON states it, "When the false oath is made to a matter "which is an absolute nullity, it is no perjury."

> 2 *Whart. Crim. Law,* 10th ed., Sec. 1282; Sec. 1546, 11th ed.

On this point, see the authorities cited at pages 15 and 39 of appellant's brief, and not disputed or challenged by counsel for appellee, but on the contrary conceded to be a correct statement of the law of California (Rec., p. 5), as it undoubtedly is, upon both principle and authority. Now this is the interposed defense, the rejected defense, of which the appellant was arbitrarily deprived by the "trial court," on the very ground upon which the law required that the defense be received and sustained. *Clearly, and according to the authorities cited at pages 15 and 39 of appellant's brief, the assailed testimony could not by any possibility be perjury in the extradition case, unless the ceremony of May 15, 1889, constituted a legal marriage with the prosecutrix were she a party to it.* This is the undisputed, the unchallenged, and the indisputable law of California. The rejected defense presented this decisive point; therefore the appellant was deprived of a legally sufficient defense to the accusation; a defense going to the merits, and establishing his innocence of the charge on which he has been convicted. Clearly, the appellant could not be guilty of perjury in denying that the prosecutrix was a party to what the law expressly

declared void "from the beginning," were she in fact a party to it; *for on principle and authority it is well settled that testimony dependent on the mythical and illusive support of a nullity for its probative or evidentiary value, cannot in law constitute the legal or competent basis of a charge of perjury, but is itself a nullity.* The decision of the State appellate courts could not impart validity to the conviction (*Pioneer Land Co. v. Maddux*, 109 Cal. 633); they would both be void for the same reason. See also pages 45 to 49 of appellant's brief, in reference to the void nature of the decision of the State appellate courts. The great and obvious fault with the decision and opinion of the State appellate courts is, in confining their consideration and determination of the case to the mere question of parties to the ceremony of May 15, 1889, irrespective of the point raised that the ceremony, had it been with the prosecutrix, was for that very reason void "from the beginning," by the express terms of section sixty-one of the Civil Code of California; being thus void, the conclusion must follow that no perjury was possible in the testimony, the basis of the conviction. Therefore, the rejection of the interposed defense on the very ground upon which the law required it be received and sustained, is the denial, and the arbitrary denial of the *due process of law* guaranteed the appellant by the Fourteenth Amendment of the Constitution of the United States, according to the authorities cited on pages *36 et seq.* of appellant's brief. The resulting imprisonment being in violation of the Constitution, is also a violation of the *treaty right* of return, secured to the appellant in virtue of his extradition, as an essential condition thereof, as well of every extradition pursuant to treaty.

II.

Extradition Jurisdiction, Supreme and Exclusive.

This point is quite fully presented in our two preceding briefs and not answered by counsel for appellee, other than to cite the decision in *Collins v. O'Neil,* 214 U. S. 113. No point we urge on the present appeal was decided in that case. The decision there, rests on two and only two propositions, to wit: First, that no right of return existed as against a *pending* prosecution on a subsequent charge of subsequent offense; and secondly, that there existed no preferential and procedural common law right to a trial to a conclusion of an extradition charge. Neither of these points arise on this appeal. There is no doubt that the prosecuting State may *nol pros* the extradition charge, and need not give the accused a trial to a final conclusion or at all; and there is no doubt that the accused may be prosecuted on the subsequent charge, without first affording him the right of return, or rather the opportunity of returning to the country granting the preceding extradition; but the point is, that the subsequent prosecution on the alleged subsequent offense cannot be maintained *while the extradition case is pending and undetermined,* and while therefore the accused is held by the United States in *custodia legis,* pursuant to the extradition jurisdiction over his person, conferred by the Constitution, the treaty, and by Section 5275, R. S. U. S.,—a jurisdiction beginning with the surrender of the accused to the United States, under the authority of the international warrant of extradition, and ending only on the final termination of the extradition case, in acquittal, conviction or *nol pros.* To permit a subsequent prosecution, while the extradition case

is pending and awaiting trial, is certainly not keeping faith with the treaty, nor with the obligations upon the promised performance of which the extradition was granted the United States. The test is this: Could the United States lawfully deliver over the custody of the accused for trial upon a subsequent charge of subsequent offense while the extradition case is pending and awaiting trial? The law is clear and indisputable that this cannot be done (*Spear on Extradition*, p. 78), because it would be in conflict with the international and constitutional obligations imposed by and as the result of the preceding extradition; also would be a flagrant violation or perversion of the authority conferred by the international warrant of extradition, under and by virtue of which the United States holds the custody of the accused for a specific purpose prescribed by the *treaty*, and also by Section 5275, R. S. U. S. In other words, the international warrant of extradition controls the custody of the accused until the final termination of the extradition case. It results that the surrender of the custody of the accused to the subordinate State for prosecution on a subsequent charge of subsequent offense *while the extradition case is pending and awaiting trial*, is prohibited by the treaty, because not authorized by its provisions (*Spear on Extradition*, p. 78). As the United States cannot lawfully surrender the custody of the accused to the prosecuting State except for the specific purpose prescribed by the *treaty*, it follows that the prosecuting State cannot lawfully acquire the custody as the basis of a subsequent prosecution on a subsequent charge of subsequent offense, while the extradition case is pending and awaiting trial; that therefore any attempt to thus acquire the custody of the accused, at variance with the *treaty*, and in violation

of the international warrant of extradition, would necessarily constitute an invasion of the *extradition jurisdiction* vested in the United States over the person of the accused, for the one and sole purpose of enforcing the requirements of the treaty, and the provisions of Section 5275, R. S. U. S. The case is no different in principle from that of a custody held by the United States Marshal under process of a Federal court of competent jurisdiction. Surely the State of California could not lawfully invade such Federal custody, seize the accused, and on the basis of the possession thus unlawfully obtained, prosecute him on a criminal charge of violating the Penal Code of the State. In both instances it is the supreme and paramount authority of the United States that prohibits the prosecuting State from taking the custody of the accused; but the case is stronger in its subjective subordination to the principle involved, where the accused is held by the United States in virtue of the international warrant of extradition, for there the United States would have no power to surrender his custody to the prosecuting State for a purpose at variance with, or not authorized by the *treaty,* whereas in the other case, the United States may consent to the transfer of custody, and waive its acquired jurisdiction. Finally, it should constantly be borne in mind that the accused when delivered to the United States in virtue of the international warrant of extradition, is not thereafter held by authority of nor under State process but is held exclusively pursuant to Federal authority, until the case is finally terminated in conviction. acquittal or *nol pros;* and that the warrant of extradition does not become *functus officio* until this final termination of the case, as is plainly indicated by the treaty, and by Section 5275, R. S. U. S. Also by the well

settled principle of the common law referred to by the Court in *Taylor v. Taintor*, 16 Wall. 370. See appellant's brief, page 72. All the points urged by the appellant in respect to the extradition jurisdiction, its supremacy and exclusive control of the custody, the fraudulent character of the extradition, and the resulting nullification of the derivative prosecution in the case where the conviction was obtained, the evasion of the treaty, the perversion of the extradition to a purpose not authorized by the treaty; therefore prohibited by the treaty, because at variance with its provisions, the violation of the Canadian Extradition Act, in short, each and all of the points urged on this appeal concerning the law of the extradition, and its violation in the conviction of appellant, are fully discussed in our two preceding briefs, and the authorities are there cited. The counsel for the appellee make no attempt to answer any of the points so presented, nor to question the correctness and pertinency of the authorities cited, which will be found on examination to fully sustain the points we urge in support of the appeal; it will be further noted that this is true not only in reference to the law of the extradition, but also in respect to every point we urge;—the authorities we cite will be found pertinent, and correct in principle.

III.

The Treaty Right of Return.

To guard against possible misapprehension, and with reference to the point raised at pages 17 and 18 of appellant's brief, page 25 of the supplemental brief, and page 21 of the record, we wish to urge more specifically that the *treaty right of return* for

which we contend, is not the special or *quasi* right, or rather duty of return mentioned in article three of the Supplemental Convention of July 12, 1889, in respect to averting prosecution for prior offenses, but is the general right of return, of which the other is only a special or modified application, restricted to a special purpose; therefore not a limitation of the general right granted by international law, and derived by necessary implication as an essential stipulation in the Ashburton Treaty; also in every treaty of extradition; conferred likewise by Section 5275, R. S. U. S., all this entirely irrespective of whether there are prior offenses or not. This general right of return becomes effective and operative whenever the extradited accused is legally entitled to his liberty, either by the laws of the prosecuting State or the laws of the United States. An unlawful obstruction to the legitimate exercise of this treaty right of return, by means of an imprisonment in violation of the laws of the State, or one in violation of the laws of the United States, will be remedied by *habeas corpus* from the Federal courts, without regard to whether relief has first been sought in a State court, for in all such cases, the imprisonment is necessarily in violation of *treaty right,* to wit: the right of return, itself always coincident with the prisoner's legal right to his liberty, whether the obstructing imprisonment be in violation of the Constitution or laws of the State, or the Constitution and laws of the United States. In all cases where the imprisonment is in violation of *treaty right,* the courts of the United States will grant the writ of *habeas corpus* in the first instance, and irrespective of State remedies. See authorities cited at pages 17, 32 of appellant's brief. However, and as

the record shows, we fully exhausted all State remedies, without avail.

IV.

The Other Points in the Case.

On the many other points in the case, no attempt is made by counsel for appellee to question the law or the facts as presented in our briefs, except in two instances:—In the one they contend that the trial judge was at least a judge *de facto,* but counsel evidently misapprehend the point. It is this: The alleged court was not a judicial tribunal, nor a court of established judicature of the State of California, because of the *casus omissus* existing in Section 8 of Article 6 of the Constitution of the State subsequently remedied by the constitutional amendment of November 8, 1910. Therefore prior to that date, no such court existing in California, as the one held in the case of appellant, of course, there could be no such thing as a judge *de facto* of the non-existent court. On the proposition suggested by counsel for appellee that Section 6 of Article 6 of the State Constitution, "does not in any way "limit the operation of Section 8 of Article 6," we quite agree with counsel, but make the point that by comparison it indicates the *casus omissus* in Section 8 of article 6, supplied by the constitutional amendment of November 8, 1910. And clearly it is a violation of Section 10 of Article 1 of the Constitution of the United States to apply the amendment, as do the State courts to the case of appellant (Rec., p. 9). The entire subject is fully discussed and the pertinent authorities are cited in our brief, pp. 56 to 68, and we respectfully refer the court to what is there presented. The only other point ad-

verted to by counsel for appellee is the one relating to the grossly excessive nature of the sentence. Counsel seem to think that the legislature is to blame, as if that would make any difference; but the fact remains and is undisputed, that the sentence given, and imprisonment heretofore endured, are atrociously excessive for the reasons stated in our brief, pp. 95 to 104; we respectfully refer the court to the points there presented on the subject, and the authorities there cited. If, as we contend, the sentence and imprisonment are grossly excessive, then clearly the "trial court" exceeded its jurisdiction in exacting the same; of course, there can be no such thing as valid statutory authority for a grossly excessive sentence or a grossly excessive imprisonment, as tested by the facts in the particular case. According to counsel for the prosecution (Rec., p. 5), and the counsel for appellee, the appellant was not convicted of perjury in denying a legal marriage, but of perjury in denying that the prosecutrix was a party to a ceremony that confessedly did not constitute a legal or valid marriage with her were she a party to it, and this in a case where only a legal and valid marriage would suffice to sustain the cause of action. No judgment, order or decree, or judicial proceeding, was induced or influenced by the assailed testimony, and no injury was done either public or private rights, and no such injury was possible. Hence no perjury. (*People v. Jones,* 123 Cal. 299, 302.) The sentence and imprisonment being grossly excessive, and a plain violation of the provision in the State Constitution against cruel or unusual punishment as construed in *Weems v. United States,* 217 U. S. 349, it results the imprisonment is an unlawful obstruction to the due and proper exercise of the *treaty* right of return,

and is also the deprivation of liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, for it is self-evident there can be no such thing possible as the authority of due process of law for a sentence or imprisonment that is grossly excessive in the particular case. *It is an excess of jurisdiction* (*Brown on Jurisdiction,* 2d ed., p. 348). The contention of counsel for appellee that if the sentence is within the maximum penalty fixed by the statute, it cannot be considered excessive, is manifestly untenable. If the maximum penalty of fourteen years' imprisonment, is applied to a case where on the facts, and the total absence of all possible injury to public or private rights, the minimum penalty of one year is the only one justly and reasonably proportionate to the offense if any, then clearly the maximum penalty of fourteen years would be grossly and atrociously excessive; no statute can make valid a grossly excessive sentence in the particular case; but aside from this, and according to the test adopted in the *Weems case,* we have shown in the brief and the record, that in comparison with the penalty prescribed by the Penal Code of California, in many other and much worse cases than this, both the sentence given and the imprisonment heretofore endured in the case of appellant, are outrageously excessive, and constitute a flagrant instance of cruel and unusual punishment in manifest violation of constitutional inhibition. The point is quite conclusively established in the record (Rec., pp. 9 *et seq.*) and by our brief pp. 95 *et seq.*

V.

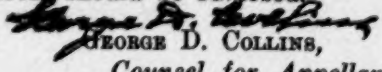
Conclusion.

It is scarcely necessary for us to state what is self-evident, that all the points we urge are available in support of the contention we make on each question we raise upon this appeal. This case now before the court presents a different imprisonment from the one involved in *Collins v. O'Neil;* also different questions from those raised or determined on that appeal. It is no objection to a point urged that it might have been but was not raised in previous litigation. The authorities cited in appellant's brief, pp. 33 and 34, are conclusive against the views of counsel for appellee, to the contrary. So, too, a decision of a State court against a right conferred by the Constitution, treaty or laws of the United States, is a decision in excess of the court's jurisdiction, and the resulting imprisonment will be redressed by means of the writ of habeas corpus from the United States courts, where all State remedies have been exhausted without avail, or the imprisonment is in violation of *treaty right.* The authorities cited in appellant's brief, pp. 17, 32, 35 and 55, are conclusive on these points against the contention of counsel for appellee that such action of the State courts in violation of constitutional or treaty right, cannot be nullified or redressed on *habeas corpus* from the courts of the United States, and refute counsel's contention that the constitutional points raised, though well taken, are not jurisdictional. No such clearly untenable propositions would have been urged by the counsel, if they had examined the authorities cited in our brief; needless to say the counsel cite none to the contrary. Finally, counsel while conceding the soundness of the rule that holds them to the

facts as presented in the record, constantly violate it in their brief and argument; of course, in this, their views at variance or in conflict with the record, must be deemed utterly irrelevant and untenable. However, there is nothing in any of the suggestions urged by counsel for appellee that can be legally or logically considered an answer to any one of the many points presented in appellant's briefs. There are certain devious and deceptive assertions made no doubt inadvisedly by counsel, that we wish to specifically dispute: 1. It is not the fact that the pre-existing common law marriage rests upon the unsupported testimony of the defendant. Numerous witnesses testified in corroboration, and the prosecution did not attempt any contradiction, nor ever assign any perjury on the point; but the counsel for appellee must accept the record (Rec., pp. 4, 5, 7). 2. In the second place, we do not and never did contend for the utterly absurd point that we were deprived of due process of law in the failure or refusal of the State appellate courts to pass on the Federal questions we raised. 3. In the third place, the illustration given by counsel at page 10 of their brief as to the defense of insanity and disqualified celebrant, has no analogy here, as it pertains to what is merely voidable and not absolutely void. 4. In the fourth place, on page 13 of their brief, the counsel confuse points altogether separate and distinct, by a very general and reckless statement that they are one and the same. 5. In the next place, there is nothing in the history of the case, nor in the record, in the slightest degree at variance with the averments of paragraph 9 of the complaint (Rec., pp. 21, 22). The counsel designate it paragraph 10, but as that is the prayer for relief, they perhaps refer to paragraph 9. In any event, the counsel must

take the record as conclusive on this appeal, for it is the legal right of appellant to establish the facts averred, by satisfactory and adequate evidence, when given the opportunity. Therefore, the counsel cannot be heard to dispute the verity of the record, at least not until return is made to the writ of *habeas corpus* that must issue after the judgment here appealed from is reversed.

It is respectfully submitted that for the reasons and upon the points presented in our briefs, the judgment appealed from should be reversed.



GEORGE D. COLLINS,
Counsel for Appellant.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court.

19

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1914.

No. 594.

GEORGE D. COLLINS, APPELLANT,

vs.

JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, COUNTY OF MARIN, NORTHERN DISTRICT OF CALIFORNIA, APPELLEE.

BRIEF AND ARGUMENT FOR APPELLEE.

U. S. WEBB,
Attorney General of the State of California,
ROBERT W. HARRISON,
Deputy Attorney General, and
RAYMOND BENJAMIN,
Chief Deputy Attorney General,
Attorneys for Appellee.

(24,338)

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JAMES A. JOHNSTON, THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA, AT SAN QUENTIN, COUNTY OF MARIN, NORTHERN DISTRICT OF CALIFORNIA, APPELLEE.

Brief and Argument of James A. Johnston, the Warden of the State Prison of the State of California, at San Quentin, County of Marin, Northern District of California.

Opening Statement.

The transcript of record herein shows that the appellant filed a complaint in the District Court of the United States for the Northern District of California against James A. Johnston, as warden of the State prison of the State of California at San Quentin, in the County of Marin, in said district, praying in said complaint that said court grant him a writ of *habeas corpus* directed to said James A. Johnston as

such warden, and returnable before said court at a time and place to be designated in said writ. It does not appear that any writ was issued, but it does appear that said court rendered a judgment denying said petition and dismissing said complaint, and thereafter made an order allowing an appeal from said judgment to the Supreme Court of the United States, and certified therein that there was probable cause for the allowance of said appeal. It further appears that thereafter a citation was issued by said district court to said James A. Johnston as such warden, citing him to appear before the Supreme Court of the United States, pursuant to said appeal, and show cause, if any he has, why said judgment should not be corrected.

It thus appears that Warden Johnston was never brought under the jurisdiction of said district court by the service of any writ and was never in that court afforded an opportunity to justify the detention of the appellant. It is evident, therefore, that upon this proceeding in the Supreme Court Johnston should not be required by such order of the district court to make a return or show, as in an original proceeding, justification for his detention of the appellant, and that the only question before the Supreme Court is whether the district court erred in denying the appellant's petition and dismissing his complaint; whether in fact the district court, upon the showing made by the complaint, should have issued a writ requiring said Johnston to show by what authority he detained the appellant. This question should be determined solely from the matter stated in said complaint, and unless it affirmatively appears therefrom that such detention was unlawful the judgment of the district court should not be disturbed. The question is not whether Johnston has shown justification for such detention, nor whether appellant is to be released from the custody of said Johnston.

Johnston might well await the determination of the Supreme Court, knowing that not having been afforded an opportunity to show cause in the district court, and not being required or permitted to make return in the Supreme Court

as upon an original application, he will in the future, provided the Supreme Court shall find error in the action of the district court, have, and for the first time, full opportunity to make in the district court whatever showing he has to justify such detention of the appellant, with right of appeal thereafter from any judgment that may be rendered in that court. In other words, as the judgment of the district court was rendered in a proceeding in which it had acquired no jurisdiction over said Johnston, and as the proceeding there was, as to him, determined *ex parte,* so will any decision by the Supreme Court upon the present appeal from that judgment be likewise an *ex parte* determination.

Not having been afforded an opportunity in the district court to justify his detention of the appellant, Johnston should not be required to sustain in this court the judgment of the district court, nor should any determination be made by this court which will in any way prejudice Johnston in any showing which he might hereafter be called upon to make in the district court. Irrespective of these matters we nevertheless desire to avail ourselves of the privilege of now presenting matter which in our opinion fully justifies the ruling of the district court, and now do so fully appreciating that the questions here presented to the Supreme Court are to be determined, not from what appellee might show upon a return to a writ regularly issued, if so permitted by the court, but from the matter alleged in the petition or complaint filed in the district court, and from matters of which the Supreme Court has knowledge or will take judicial notice.

At the outset it should be noted from the record, and from matters of which the court will take judicial notice, that each and every point now made by the appellant, if not actually made upon the trial or on the appeal of his case, could have been legally made upon such trial or on such appeal. And if, as appellant claims, any point was overlooked by a court, he could in the regular course of procedure have directed that court's attention thereto, and have made such point the basis for an argument upon appeal or petition for rehearing

in the State courts, or upon a writ of error and petition for rehearing in this court.

If such points were made and passed upon they are matter adjudged, and should not now in this proceeding be inquired into. If they were not made, the court is justified in assuming that the appellant abandoned them as untenable, and he should not at this late day be permitted to claim the indulgence of this court for their further consideration. Even if any points were made by appellant and not passed on by any court, his remedy then lay in the higher court, and if such higher court ignored them his remedy lay in a petition for rehearing, which would have directed the court's attention to the omission. If still the court overlooked any points made, and to which its attention had been expressly drawn by means of such petition, it must be assumed that those points were not deemed by the court of sufficient importance to warrant recognition. Nor should they be given further recognition in this proceeding, which is but an attempt to collaterally attack a judgment duly rendered and regular on its face, and which upon direct attack has been affirmed by the District Court of Appeals of the State of California for the First Appellate District, and a rehearing therein denied by the Supreme Court of that State (People *vs.* Collins, 6 Cal. App., 492; 92 Pac. Rep., 513). In addition thereto the appellant herein has upon two separate occasions after his conviction petitioned for his discharge upon *habeas corpus*. Each of his petitions was denied and the orders therein were subsequently reviewed and affirmed by this court in the case of Collins *vs.* O'Neil, 214 U. S., 113. It would therefore appear that he has had full opportunity to raise any and all questions involving the validity of his conviction, and that as to the matters now presented in his complaint herein it should be deemed that they have been finally and conclusively adjudged, and those questions, and, in fact, the entire case, should be treated as closed to further discussion. However, out of an abundance of caution and to the end that this

court may not be misled by the record and brief of appellant, we desire to reply thereto on behalf of said Johnston.

Questions Raised on Appeal.

1. It appears from the record that George D. Collins, the plaintiff and appellant herein, was sued by Charlotta Newman Collins in the Superior Court of the State of California in and for the city and county of San Francisco for support and maintenance under section one hundred and thirty-seven of the Civil Code of said State. In the complaint there was an averment of a marriage ceremony performed between the plaintiff, Charlotta Newman Collins, and said defendant, Collins, on May 15, 1889, and an averment of a valid marriage between said parties on said day. Collins filed an answer in that case, verified by himself, in which under oath he denied said marriage to said plaintiff and denied that he was married to said plaintiff.

An indictment was found by the grand jury on July 13, 1905, charging Collins with having committed the crime of perjury in so verifying said answer. Upon this indictment he was extradited from Canada and put upon trial in the Superior Court for the City and County of San Francisco. The plaintiff in the civil action, Charlotta Newman Collins, is referred to in the record herein as the prosecutrix in this criminal action, commenced on July 13, 1905, and therefore we will so designate her. The issue upon the trial of that criminal action framed by the indictment and the defendant's plea of not guilty, was whether Collins was married to such prosecutrix, Charlotta Newman Collins, on May 15, 1889. The defendant at that trial in his defense offered evidence tending to prove that prior to said May 15, 1889, and on November 5, 1888, he had contracted a valid common-law marriage with one Agnes M. Newman, followed by consummation and a public and mutual assumption of marital rights, duties and obligations, and that said marriage continued until it was dissolved by the death of said Agnes, in May,

1901. He contended, therefore, that because of said previous common-law marriage with Agnes any marriage ceremony between himself and the prosecutrix, Charlotta, on May 15, 1889, was void, and that a charge of perjury could not be predicated upon the fact that he had sworn in his answer in the civil suit that he was not a party to such void marriage. He contended that if such ceremonial marriage was void the prosecutrix, who claimed to be the other party to such marriage, was not his wife, and could not maintain an action for maintenance; that it was immaterial whether he went through the form of a marriage ceremony with her on May 15, 1889, and his oath in his answer to the effect that he had not done so, was therefore an oath upon an immaterial matter upon which perjury could not be predicated. In support of this defense Collins testified at that trial as to this previous common-law marriage with Agnes, and also testified that the marriage ceremony performed on May 15, 1889, was not performed between himself and the prosecutrix, Charlotta, but was performed between himself and Agnes. The jury in that case disagreed. Thereafter, on December 29, 1905, another indictment was found against Collins, charging him with having committed perjury in testifying in the course of said trial that said marriage ceremony of May 15, 1889, was not performed between himself and the prosecutrix, but was performed between himself and Agnes. To this second indictment he pleaded not guilty and was put upon trial thereon. At such trial he offered as proof in his defense the same matter which he had introduced in the previous trial, that is to say, he offered to prove that prior to said marriage ceremony of May 15, 1889, he had contracted a common-law marriage with Agnes, contending that because of such common-law marriage the ceremony of marriage of May 15, 1889, was of no validity, and that therefore no perjury could be predicated upon his testimony in the previous trial, with respect to the actual parties to such ceremony. On objection by the prosecution and upon their as-

sertion that they were not at the then trial contending, and the indictment of December 29, 1905, did not so allege, that such ceremony of May 15, 1889, constituted a legal marriage with prosecutrix, the trial judge sustained such objection and excluded such proffered evidence. The appellant now contends that this ruling on the part of the judge deprived him of a perfectly valid and legally sufficient defense to the accusation, and that thereby he was deprived of the due process of law and equal protection of the laws of said State of California, secured to him by the Fourteenth Amendment of the Constitution of the United States. It is upon this alleged denial to him of due process of law that he bases his first and seemingly main point in his application for a writ of *habeas corpus*.

The action and ruling of the trial judge was entirely within his jurisdiction; he was called upon to rule upon such objection to offered evidence and either sustain or overrule such objection. His action in admitting or rejecting such evidence did not determine his jurisdiction to proceed further in said cause. And even though he committed error in such rejection, which we do not admit, the trial judge after such ruling still retained jurisdiction to proceed with said cause to its conclusion. The remedy to the defendant therein, if he felt himself aggrieved by such ruling, was by appeal to the higher court and the assignment of such ruling as error.

There being no want of jurisdiction in the trial court, the correctness of such ruling cannot be now attacked in a *habeas corpus* proceeding.

The appellant (Record, page 6) contends that it has always been the law of the State of California that the said proffered defense is a valid and sufficient defense to said charge of perjury specified in and the basis of the judgment which was rendered upon the conviction in said trial. If so, it was incumbent upon him to present the error to the higher court and ask a reversal of the judgment. He contends that he did so and that the appellate courts of the State ignored and

persistently evaded this point, and that by reason thereof he has been denied due process of law and the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

Substantially the same point now made by appellant was passed upon by the appellate court and will be found discussed in its opinion in People *vs.* Collins, 6 Cal. App., 492, at page 505, where the court refers to his offer to prove the previous contract marriage and his argument that the ceremony being of no legal effect, testimony in regard thereto could not be material upon the question of marriage. The Court directs attention to the fact that a distinct issue was presented in the trial of the extradition indictment (the first trial) as to whether or not the defendant and Charlotta Newman (the prosecutrix) intermarried on May 15, 1889; that evidence had been given in that trial tending to prove a marriage ceremony between defendant and said Charlotta; that his testimony that the ceremony was between himself and Agnes tended to prove that no ceremony and therefore no marriage had been performed between himself and Charlotta. In its consideration of that testimony, the court holds that the materiality of such testimony could not be affected by the fact that such ceremony did not effectuate a marriage between defendant and Agnes and that if his testimony as to the ceremony was true there was no ceremony of marriage between himself and Charlotta, whether or not there had ever been any prior marriage to Agnes. But what was there said by the court applies in all its force to appellant's present contention. The court had previously in its opinion pointed out that the materiality of testimony may depend upon testimon previously introduced upon the trial and that if the matter falsely sworn to tends to support and give credit to the witness in respect to the main facts, it is perjury.

In the first trial for perjury the issue was the validity of a marriage between Collins and Charlotta Newman Collins, supposedly effectuated by the alleged marriage ceremony.

On that trial therefore the performance of such ceremony was material matter. Collins interposed two defenses, to which he testified:

First. That he had never been a party to a marriage ceremony with Charlotta inasmuch as the ceremony alleged was between himself and Agnes.

Second. That even if such marriage ceremony had been performed between himself and Charlotta, it could not effectuate a marriage between them because he was at that time married to Agnes.

It thus appears that so far as the first perjury trial was concerned, the performance of a marriage ceremony between Collins and Charlotta Newman was always a material matter as that was the medium through which Charlotta claimed to have become the wife of Collins. Whether Collins was in fact at that time married to another woman and therefore such marriage ceremony with Charlotta could effectuate a marriage was a matter for the jury to decide. The prosecution introduced evidence of the performance of such marriage ceremony between Collins and Charlotta Newman. Collins denied that such ceremony had ever taken place. Upon this testimony and for such denial Collins was indicted the second time and convicted upon trial. Although Collins in this proceeding claims that his alleged common-law marriage with Agnes is admitted to be true, it will be observed that at no time has such marriage been conclusively established and that the testimony of Collins is its only substantiation.

At no time during the first trial did the performance of the marriage ceremony between Collins and Charlotta Newman become immaterial, for if Collins failed to establish by determinative proof on such trial a prior common-law marriage with Agnes, such ceremony would have effectuated a valid marriage with Charlotta if performed with her. As a defense to the fact of such ceremony and in contention against the claim that a valid marriage ensued by reason

thereof, Collins might as well have testified that at the time of the ceremony he or Charlotta was insane,—or that the ceremony had been performed by a person not authorized in law to pronounce the same. The fact of the ceremony would still have been material—its result would, so far as the perjury charge is concerned, have depended upon whether the jury believed or did not believe Collins' testimony and defense. The jury in the case disagreed. If the jury had agreed upon the guilt of Collins, that verdict would necessarily decide that Collins did marry Charlotta by the marriage ceremony alleged, that it was not Agnes with whom he entered into such ceremony, and that they found Collins' testimony about the prior common-law marriage with Agnes false.

As this conclusion of the case was within the possibilities, the materiality of the performance of a marriage ceremony between Collins and Charlotta seems undeniable, and hence, when the defendant testified that such ceremony was not between himself and Charlotta but was between himself and Agnes, that was matter falsely sworn to which tended to support and give credit to him, the witness, in respect to the main facts as to whether there was a marriage between himself and Charlotta. It was therefore perjury whether or not there had ever been any prior marriage to Agnes.

The materiality of testimony upon which a charge of perjury is predicated, is, of course, to be determined as of the time it was given. The testimony of Collins denying any ceremony of marriage between himself and Charlotta was material at the time it was given irrespective of the question of the alleged existing common-law marriage with Agnes.

In the trial upon the second indictment, the only questions at issue were whether such testimony was material when given and whether it was false and known to be so. Upon these issues the question whether there had in fact been a previous common-law marriage was entirely irrelevant and immaterial and the evidence upon that point offered by Collins

was therefore rightfully excluded. Likewise it was immaterial, for the purpose of the trial upon the second indictment, whether such ceremony would or would not have resulted in a valid marriage, the only question in that respect being whether the testimony given as to the parties to that ceremony did at the time it was given bear materially upon the issue with respect to which it was given. This question was not to be affected by any showing upon the trial of the second indictment that such ceremony would not have effected a valid marriage. Such a showing made at such later time would in no way affect the materiality of the testimony given upon the previous trial. It is true that at the previous trial the case of the prosecution was based upon the assumption that such ceremony created a valid marriage between Collins and the prosecutrix. But in the later trial the case of the prosecution did not at all depend upon the effect of such ceremony. It was then but a question of whether the testimony given was at the time it was given material, and that fact was to be determined by the issues as they were presented in the former trial, and not by any issues raised in the second trial or by any evidence which the defendant might offer in the second trial to establish the defense in the first trial.

The court held that there was no error in excluding from the second trial the proffered testimony, and its reasons for so holding substantially cover the present contention of the appellant. That being so, as his point has been presented to and passed upon by the appellate court, the basis for his present proceeding in *habeas corpus* falls, his argument seemingly being that because the Court ignored and evaded the question therefore he has been denied due process of law and prevented from applying for a writ of error to this court.

But here again the appellate court had full jurisdiction of the subject-matter and of the person of appellant, and even if that court had failed to pass upon a point raised by the appellant the validity of the judgment of affirmance

subsequently rendered by such court did not depend upon its having considered and expressed an opinion upon each point presented by appellant in the transcript and in the briefs. In the fact that the court affirmed the judgment there is sufficient to assume as matter of law that it did consider the several points raised and adjudged them to be not of sufficient weight to warrant a finding of error or a reversal of the judgment.

There being no want of jurisdiction, either in the trial or in the appellate courts, the sufficiency of the judgment of the trial court, regular as it is on its face, and affirmed as it was by the appellate court, cannot be now attacked in this *habeas corpus* proceeding.

2. The second point made by appellant, as disclosed by the record, is that the judgment and imprisonment thereon are unlawful in that the judgment was not a judgment of any legally-constituted court of judicature of the State of California, because Judge Burnett, who presided at the trial and who rendered the judgment, was never at any time a judge *de facto* or *de jure* of the Superior Court for the City and County of San Francisco, and that because of that fact the conviction of appellant and the judgment thereon were without due process of law and in violation of the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

A sufficient answer to this point is found in the fact that Judge Burnett was at least a *de facto* judge in the proceedings in question. But more than this he was a *de jure* judge under the very provisions of section 8 of article VI of the Constitution cited by the appellant on page 8 of the record and 59 of his brief. It is stated in the record that Judge Burnett presided at said trial "at the request of the Governor." In that section of the Constitution it is expressly declared that it shall be mandatory upon a judge of another county to so preside when requested to do so by the Governor.

Section 6 of article VI of the Constitution does not in any way limit the operation of section 8 of article VI.

3. The third point presented by the appellant is that the sentence in the judgment in question and the consequent imprisonment thereon constitute cruel and unusual punishment in that it is grossly excessive. The sentence was fourteen years in the State prison, the maximum sentence prescribed for such crime of perjury by the laws of California. It is not claimed by appellant that any sentence was imposed greater than the language of the statute permitted, but it is argued that because of the punishment prescribed by the legislature for some other crimes is less, that therefore the sentence in his case was grossly unjust and that he is being deprived of the equal protection of the laws. It is sufficient upon this point to say that the argument of appellant addresses itself to the legislature; the court should not be concerned therewith, unless there is in the punishment prescribed by the legislature an evident violation of the constitutional provisions. If the legislative act permits of the imposition by the trial judge of a lesser punishment, but fixes a maximum which is not excessive, the fact that the trial judge has deemed the offense to warrant the maximum and has imposed such maximum penalty does not constitute cruel and unusual punishment.

4. The fourth point is included in the third and is sufficiently answered in the same way.

5. The fifth and sixth points, as well as that stated in paragraph VIII of the complaint, have in effect been disposed of in the previous *habeas corpus* proceedings.

6. The matters presented in paragraphs IV, V and VII of the complaint are but repetitions of his third point and should be treated accordingly.

7. The matters presented in paragraph VI of the complaint are but repetitions of his first three points and are sufficiently disposed of in what has been said with respect to those points.

8. The matters presented in paragraph X of the complaint are fully refuted by the history of the entire case found herein and in the case of Collins *vs.* O'Neil, *supra*, and by what has been heretofore said with respect to this attempted collateral attack upon a valid judgment of conviction.

It is respectfully submitted that there is no merit in any of the points made by the appellant and that the judgment of the district court should be affirmed.

Respectfully submitted,

U. S. WEBB,
Attorney General of the State of California;
ROBERT W. HARRISON,
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RAYMOND BENJAMIN,
Chief Deputy Attorney General,
Attorneys for said James A. Johnston, the Warden of the State Prison of the State of California, at San Quentin, County of Marin, Northern District of California, Appellee.

(27868)

COLLINS *v.* JOHNSTON, WARDEN OF THE CALIFORNIA STATE PRISON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 594. Argued February 25, 1915.—Decided May 17, 1915.

In *habeas corpus* proceedings this court is confined to the examination of fundamental and jurisdictional questions; the writ cannot be employed as a substitute for a writ of error.

Refusal of the trial court to permit a proffered defense, even if erroneous, does not ordinarily affect the jurisdiction or amount to more than error.

An averment of arbitrary action in judicial ruling merely states a conclusion of law and has no effect in the absence of facts alleged sufficient to show that the ruling was actually arbitrary.

Even though the question whether the judgment was rendered by a properly constituted court were open here, this court sees no reason to disagree with the meaning attributed by the state courts of Cal-

ifornia to Art. VI, §§ 6 and 8 of the constitution of that State in regard to a judge of the Superior Court of one county holding a court in another county on the request of the governor of the State.

An amendment of the constitution giving authority where it existed before may be adopted from abundant caution and not as recognizing and supplying a *casus omissus*.

A sentence of fourteen years imprisonment for one duly convicted of perjury does not amount to a deprivation of liberty without due process of law where it does not exceed the limit authorized by the statute.

Comparative gravity of criminal offenses is a matter for the State itself to determine, and the fact that some offenses are punished with less severity than others does not amount to a denial of equal protection of the law.

The prohibition in the Eighth Amendment of cruel and unusual punishments is a limitation upon the Federal Government and not on the States.

A person extradited from Great Britain is not protected by § 5275, Rev. Stat., from being tried and convicted for a crime committed in the State after extradition—and so *held* in this case as to perjury committed on the trial of the crime for which the party was extradited.

THE facts, which involve questions raised under the Eighth and Fourteenth Amendments, and under an extradition treaty, as to the validity of the conviction and sentence of appellant in a criminal court of California, are stated in the opinion.

Mr. George D. Collins pro se, submitted.

Mr. Raymond Benjamin, Chief Deputy Attorney General of the State of California, with whom *Mr. Robert W. Harrison*, Deputy Attorney General of the State of California, and *Mr. U. S. Webb*, Attorney General for the State of California, were on the brief for the appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal, taken under § 238, Jud. Code, to review a final order of the District Court of the United

States for the Northern District of California denying appellant's petition for a writ of *habeas corpus* to be addressed to appellee, as warden of the State Prison of the State of California, in whose custody appellant alleges he is held in violation of the Constitution, laws, and treaties of the United States. The petition was based upon § 753, Rev. Stat., and was denied under § 755 upon the ground that, on the face of it, the petitioner was not entitled to the writ.

Appellant is held under the authority of a judgment of the Superior Court in and for the City and County of San Francisco, in the State of California, imposing a sentence of imprisonment for the term of fourteen years, upon his conviction for perjury upon an indictment presented December 29, 1905. The allegations of fact upon which the Federal questions are raised are somewhat involved, and not easily understood without reference to previous proceedings set forth in *Collins* v. *O'Neil*, 214 U. S. 113, of which appellant asks us to take judicial notice. Reading the averments of the petition with this aid, the following facts appear: On July 13, 1905, appellant was indicted by the grand jury of the City and County of San Francisco for the crime of perjury, committed in the giving of testimony in an action pending in a court of that county wherein one Charlotta Collins was plaintiff and appellant was defendant, in which she sought to obtain maintenance, support, and alimony for herself and her child; the alleged false testimony being that the said Charlotta and appellant did not intermarry on May 15, 1889, or at any other time, and were never husband and wife. To answer this indictment appellant was extradited from Canada, and he was put upon trial in the month of December before the Superior Court of the City and County of San Francisco. The jury disagreed, and while appellant was in custody awaiting a further trial he was, on December 29, 1905, again indicted for perjury, the offense being alleged to

have been committed in the giving of evidence upon the trial of the first indictment, in that he falsely testified that on May 15, 1889, at a specified place in the City of San Francisco, a marriage ceremony was performed between him and one Agnes Newman, whereas in truth, at the time and place specified, a marriage ceremony was performed between him and one Charlotta Newman. Before being placed on trial upon the second indictment, appellant applied to the United States Circuit Court for the Northern District of California for a writ of *habeas corpus*, which was denied. 148 Fed. Rep. 573. He was then tried, found guilty, and sentenced; the judgment was affirmed by the District Court of Appeal, and a petition to have the cause heard in the Supreme Court was denied. 6 Cal. App. 492; 92 Pac. Rep. 513. Meanwhile, successive applications for *habeas corpus* were made to the United States District and Circuit Courts for the Northern District of California, and denied. 151 Fed. Rep. 358; 154 Fed. Rep. 980. And the Supreme Court of California, having entertained such an application, overruled his contentions and remanded him to the custody of the Sheriff. 151 California, 340, 351. This court reviewed the decision of the state Supreme Court, and the decision of the United States Circuit Court reported in 154 Fed. Rep. 980, with the result that both were affirmed. 214 U. S. 113.

It is unnecessary to enlarge upon the doctrine, thoroughly established and recently re-stated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error. *Frank* v. *Mangum*, decided April 19, 1915, *ante*, p. 309.

In his petition and in voluminous briefs appellant raises numerous questions, of which it is sufficient to mention the following:

(1) He contends that he was deprived of due process of law in violation of the Fourteenth Amendment, in that the trial court arbitrarily denied and refused to consider a valid and legally conclusive defense offered by him upon the trial of the second indictment, which resulted in the conviction upon which he is now held in custody. The alleged defense was: that testimony relating to the question of fact whether a ceremonial marriage took place on May 15, 1889, between him and Charlotta Newman could not be material to the issue upon the first indictment nor furnish valid or competent foundation for a charge of perjury, because the marriage, if performed, was a nullity; and this because at a previous time appellant and Agnes Newman intermarried by written and mutual contract of marriage *per verba de præsenti*, followed by a consummation and a public and mutual assumption of marital rights, duties, and obligations, which marriage continued to exist until dissolved by the death of Agnes in the month of May, 1901, and because of this previous marriage any marriage ceremony between appellant and Charlotta on May 15, A. D. 1889, was void by § 61 of the Civil Code of California. But, plainly, the question whether testimony respecting the alleged ceremony was material upon the trial of the first indictment was to be determined by considering the nature of the issue that was then being tried, and the state of the other evidence that had been introduced at the time the alleged false testimony was given; not by reëxamining the merits of that issue or the truth of the other evidence. The principal questions at issue upon the former trial, so far as appears, were: (a) Did appellant enter into a ceremonial marriage with Charlotta on the date named? (b) Was he, at that time, already married to Agnes, then still living? These were questions of fact; if both were answered in the affirmative, the marriage with Charlotta although made in fact was void in law. In order for the prosecution to succeed, the

first must be answered in the affirmative, the second in the negative; hence, testimony bearing upon either was material. The alleged false testimony of appellant tended to prove the negative of the first question. Manifestly, when he was afterwards tried upon an indictment for perjury based upon that testimony, no legitimate light could be thrown upon the question of its materiality or of its falsity by re-trying the second question of fact or the legal conclusions resulting therefrom. This matter was sufficiently disposed of by the state Court of Appeal in *People* v. *Collins*, 6 Cal. App. 492, 498, 500, 505; 92 Pac. Rep. 513, 515, 516, 518.

Nor are we able to see that the refusal of the proffered defense, even were such refusal erroneous, could at all affect the jurisdiction of the court, or amount to more than an error committed in the exercise of jurisdiction. The averment that the defense was "arbitrarily refused" merely states a conclusion of law, and is of no effect in the absence of facts sufficient to show that the ruling was in truth arbitrary; and no such facts are alleged.

(2) A second contention is that the judgment under which appellant is held in custody is not the judgment of the Superior Court in and for the City and County of San Francisco, or of any legally constituted court of judicature, because Judge Burnett, who presided at the trial and rendered the judgment, was not a judge *de facto* or *de jure* of that court, but was a judge of the Superior Court for another county in said State, and presided at appellant's trial at the request of the Governor, and without the consent or stipulation of appellant or any request of the judges of the San Francisco Superior Court. This contention is to be tested by the state constitution, of which the pertinent provisions, as they stood at the time of appellant's conviction, are as follows:

"Art. VI, Sec. 6. There shall be in each of the organized

counties, or cities and counties, of the State, a superior court, for each of which at least one judge shall be elected by the qualified electors of the county, or city and county, at the general state election; *provided* . . . that in the city and county of San Francisco there shall be elected twelve judges of the superior court, any one or more of whom may hold court. There may be as many sessions of said court, at the same time, as there are judges thereof. . . . The judgments, orders, and proceedings of any session of the superior court held by any one or more of the judges of said courts, respectively, shall be equally effectual as if all the judges of said respective courts presided at such session. . . .

"Sec. 8. A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do. . . . "

Of course, these sections are to be read together, and their natural meaning is that where a judge of a superior court of one county holds a superior court in another county upon the request of the Governor, the court so held by him constitutes a session of the superior court, with the same jurisdiction as if one of the elected judges were sitting. *Gardner* v. *Jones*, 126 California, 614, 620, is to this effect. And when we add that Judge Burnett presided at appellant's trial upon the request of the Governor, that the District Court of Appeal affirmed the judgment and the Supreme Court refused to review its decision (6 Cal. App. 492, 507), and that the latter court, in the *habeas corpus* proceeding, upheld the jurisdiction of the trial court (151 California, 340), no reasonable doubt remains that the state courts advisedly adopted such a construction of § 8 as to sustain Judge Burnett's authority, even though appellant's present contention was not raised and therefore not distinctly passed upon. Assuming the question to be open here, we see no reason

to disagree with the meaning thus attributed to the constitution by the courts of the State.

According to appellant's construction of § 8, *supra*, a superior court judge elected in one county, when holding a superior court in another county upon the request of the Governor, would be without jurisdiction, and incapable even of holding a "session" of the court, because of the absence of express provision in the constitution to that effect. This is so plainly unreasonable that it might be dismissed as absurd, except for the insistence that by a constitutional amendment adopted November 8, 1910 (several years after appellant's conviction), the people themselves recognized a *casus omissus* in § 8 of Article VI, and supplied it by adding these clauses: "There may be as many sessions of a superior court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges *pro tempore*. The judgments, orders, acts and proceedings of any session of any superior court held by one or more judges acting upon request, or judge or judges *pro tempore* shall be equally effective as if the judge or all the judges of such court presided at such session." But in view of the settled construction of the section as it previously stood, we must regard the amendment as having been adopted, from abundant caution, to remove all question of doubt, rather than as recognizing and supplying a *casus omissus*.

(3) It is contended that a sentence of fourteen years' imprisonment for the crime of perjury is grossly excessive, and therefore illegal, and prohibited by the Fourteenth Amendment of the Constitution of the United States. The sentence was based upon § 126 of the California Penal Code, which reads: "Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years." This is not a case, therefore, of a sentence exceeding the limit authorized by law. *In re Snow*, 120 U. S. 274; *Hans Nielsen, Petitioner*, 131 U. S. 176.

To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several States; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the Fourteenth Amendment either in depriving appellant of his liberty without due process of law or in denying to him the equal protection of the laws. *In re Kemmler*, 136 U. S. 436, 448; *Coffey* v. *Harlan County*, 204 U. S. 659, 662.

The argument under the equal protection clause is based principally upon the averment that the false testimony to the effect that a ceremonial marriage between appellant and Charlotta Newman did not take place on May 15, 1889, "could not by any possibility induce or influence any order, judgment, or decree of any court or judge, nor any verdict or judicial proceedings, and did not and could not by any possibility injure or tend to injure any one in his or her rights or status in law." Since the petition shows that the natural tendency, and, presumably, the intended result, of the perjury was to improperly procure appellant's acquittal upon the first indictment, the present contention is so manifestly frivolous as not to require further discussion. It is argued, also, that in the case of other felonies denounced by the laws of California, "many of them offenses of greater gravity and of more injurious consequences than perjury, the average maximum penalty is five years' imprisonment in the penitentiary, and no more." But it is hardly necessary to say that the comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the State itself to determine.

The Eighth Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been often pointed out, this is a limitation upon the Federal

Government, not upon the States. *Barron* v. *Mayor of Baltimore*, 7 Pet. 243, 247; *Pervear* v. *Commonwealth*, 5 Wall. 475, 480; *McElvaine* v. *Brush*, 142 U. S. 155, 158; *O'Neil* v. *Vermont*, 144 U. S. 323, 332; *Ensign* v. *Pennsylvania*, 227 U. S. 592, 597.

(4) It is contended, upon the authority of *United States* v. *Rauscher*, 119 U. S. 407, 430; *Cosgrove* v. *Winney*, 174 U. S. 64, and other cases, that the conviction and imprisonment of appellant under the second indictment are in contravention of the treaty of extradition between the United States and Great Britain, in that he was extradited for the sole purpose of being brought to trial upon the first indictment, and that while that charge was awaiting trial and final disposition, he could not, without violence to the treaty and § 5275 of the Revised Statutes, be tried, convicted, sentenced, and imprisoned upon another charge. It is alleged that the first indictment was dismissed upon motion of the prosecution on July 12, 1909; and that under the treaty and law he was entitled to a reasonable time thereafter in which to return to the country from which he was extradited. In this form, and in others too numerous for mention, appellant reiterates the points that were decided against him by the Supreme Court of California (*In re Collins*, 151 California, 340), whose judgment was affirmed by this court in *Collins* v. *O'Neil*, 214 U. S. 113, where the court said (p. 122): "The contention of the plaintiff in error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed, is not even plausible"; and further (p. 123): "The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the State whose laws he has violated

since his extradition, and we cannot see that it is a matter of any interest to the surrendering government. There is nothing in § 5275, Rev. Stat., *supra*, which gives the least countenance to the claims of the plaintiff in error."

Appellant's other points and arguments are but variations of those that have been mentioned.

The final order of the District Court refusing the application for a writ of *habeas corpus* is

Affirmed.